Supreme Court, U.S.
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91-915

No. 91-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ISCA ENTERPRISES, RAPJOE REALTY CORP., MICHELLE ASSETS, INC., RO-MALIK ENTERPRISES, LTD., 441-445 EAST 116TH ST., INC., DIAMOND PROPERTIES, INC.,
Petitioners,

v.

THE CITY OF NEW YORK, FELICE MICHETTI, as Commissioner of Housing Preservation and Development, CAROL O'CLEIREACAIN as Commissioner of Finance of the City of New York,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the constitutional due process requirement that interested parties receive personal service or mailed notice of foreclosure proceedings, as set forth in this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 799 (1983), is satisfied by a statutory scheme that fails to provide such notice to readily identifiable mortgagees and owners who have not formally requested such notice.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the court below: Linton Campbell, R & J Realty Corp., and Kingdom Properties, Inc. In addition, Paul Crotty and Abraham Bidderman were parties in their former official capacities as Commissioner of Housing, Preservation and Development of the City of New York and Commissioner of Finance of the City of New York, respectively. They have now been replaced in those capacities by the respondents named in the caption.

All petitioners are corporations having no parents or subsidiaries.

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ISCA ENTERPRISES, RAPJOE REALTY CORP., MICHELLE ASSETS, INC., RO-MALIK ENTERPRISES, LTD., 441-445 EAST 116TH ST., INC., DIAMOND PROPERTIES, INC.,
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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the New York Court of Appeals (Appendix A, pp. 1a - 11a, *infra*) is reported at 77 N.Y.2d 688, 572 N.E.2d 610, 569 N.Y.S.2d 927 (1991). The opinion of the Appellate Division of the Second Judicial Department in *Matter of ISCA Enterprises v. City of New York* (Appendix D, pp. 15a - 17a, *infra*) is reported at 160 A.D.2d 698, 553 N.Y.S.2d 470 (1990). The opinion of the trial court (Appendix E, pp. 18a - 20a, *infra*) is unreported. The opinion of the Appellate Division for the First Judicial Department in *Campbell v. City of New York* (Appendix F, pp. 21a - 24a, *infra*), is reported at 162 A.D.2d 212, 556 N.Y.S.2d 332 (1990). The opinion

of the trial court (Appendix G, pp. 25a - 36a, *infra*) is reported at 145 Misc. 2d 248, 546 N.Y.S.2d 781 (1989).

JURISDICTION

The judgment of the New York Court of Appeals was issued on May 2, 1991. Timely petitions for reargument were denied on July 9, 1991 (Appendix B, pp. 12a - 13a, *infra*), as reported at 78 N.Y.2d 952, 578 N.E.2d 445, 573 N.Y.S.2d 647. On October 7, 1991, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including December 6, 1991 (Appendix C, p. 14a, *infra*). The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Administrative Code of the City of New York, Sections 11-406(c), 11-416 and 11-417 (text in Appendix H, pp. 37a-38a, *infra*).

STATEMENT OF THE CASE

1. Introduction

From time to time, New York City institutes foreclosure actions on real property on which taxes are delinquent. This petition concerns 16 properties located in Manhattan and in Brooklyn that were the subjects of foreclosure actions initiated between 1974 and 1981. The petitioners were either owners or mortgagees of the properties, and none received advance notice by mail of the contemplated foreclosures.

The City proceeded under provisions of New York City's Administrative Code that require notice of foreclosure to be mailed only to "owners, mortgagees, lienors or encumbrancers, who may be entitled to receive such notice by virtue of any owner's registration or *in rem* card filed in the office of the city collector. . . ." Under this provision of law, persons having an interest in real property (other than officially listed taxpayers) are mailed a notice of foreclosure only if they have requested, by the filing of an appropriate card, that such notice be sent to them. The constitutional issue raised by this petition is, therefore, the issue that was reserved by this Court for future decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 793 n.2 (1983) — *i.e.*, whether a "notice-by-request" system for tax foreclosure actions satisfies the Due Process Clause of the Fourteenth Amendment.

2. The Manhattan Properties

Five petitioner corporations owned the 13 parcels of Manhattan real property presently involved in this case. Between 1977 and 1980, New York City initiated foreclosure actions against these properties under the procedures for *in rem* tax foreclosures prescribed by New York City's Administrative Code. In each case, the Commissioner of Finance caused a

foreclosure notice to be published once a week for six successive weeks in the *City Record* and in two newspapers circulated in New York County. Since no owner's registration or *in rem* card had been filed for any of these properties and the owners were not on the official tax rolls, no advance notice of the foreclosure was mailed to the owners.

Tax foreclosure deeds vesting title in the City were recorded on the properties on varying dates between April 27, 1977, and September 24, 1980. In September 1986, the petitioners, together with three other plaintiffs that are no longer parties in this Court, instituted nine actions against New York City in the New York courts to set aside the tax foreclosure deeds as to the 13 properties now at issue as well as a number of others. The complaints alleged that the deeds were invalid because in each case the property owner "was not given notice of the proceeding as required by the due process clause of the 14th amendment."

The nine proceedings were consolidated. On cross-motions for summary judgment it was undisputed that, with respect to the 13 properties presently involved in this case, no notice had been mailed to the properties' owners because no registration cards had been filed by them. The trial judge held that the Administrative Code's procedure by which actual notice is afforded only to owners or mortgagees requesting such notice is "insufficient to afford adequate due process notice to such parties" (Appendix G, p. 32a, *infra*). On this ground, the trial court held, with respect to the properties as to which there had been no notice mailed to the owners, that the tax foreclosure deeds were null and void.[1]

---

[1]The trial court held that three other properties had been purchased *after* tax foreclosure proceedings were initiated and the owners could not, therefore, claim that they should have been notified prior to the institution of such proceedings (Appendix G, p. 35a, *infra*). With regard to six other properties, the trial court held that a factual issue regarding receipt

The Appellate Division for the First Department affirmed on the constitutional issue for the reasons stated by the trial court (Appendix F, pp. 21a - 24a, *infra*). It modified the trial court's judgment only to the extent of dismissing claims relating to six properties (not at issue in this petition) as to which registration cards *had* been filed and the City's records showed that notices had been mailed.

3. The Brooklyn Properties

In May 1981, New York City began foreclosure actions on various properties in Brooklyn which were subject to tax delinquencies. Petitioner ISCA Enterprises was the owner of one of these properties and the mortgagee of two others. Its interests were recorded in the City Register, but ISCA had not submitted an "owner's registration or *in rem* card" for any of these properties. It was not notified of the foreclosure proceeding and had no actual knowledge that a foreclosure was pending in court.

On July 28, 1983, the City recorded tax foreclosure deeds on the three properties in which ISCA had an interest. ISCA learned of the foreclosures more than four months after the deeds were recorded, and, pursuant to New York law, it tendered the back taxes owed and applied to the New York City Board of Estimate on October 13, 1984, for release of the property.

ISCA's application remained undecided by the Board of Estimate for more than three years. On October 29, 1987, the Board of Estimate denied ISCA's application. ISCA initiated this action on December 8, 1987, requesting that the transfer

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was raised by the affidavits (Appendix G, pp. 34a - 35a, *infra*). On appeal, the plaintiffs' claims regarding these six properties were dismissed. Finally, plaintiffs prevailed as to one additional property in the lower courts, but it was subsequently discontinued from the case by agreement of the parties.

of title to the City be vacated as to each of the properties. It asserted that the failure to provide notice in advance of the foreclosure invalidated the tax foreclosure deed under this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

The City moved to dismiss on the ground that the procedure prescribed by the Administrative Code — which required notification only to those who had submitted owner's registration or *in rem* cards — was constitutional. In July 1988, the trial court rejected ISCA's constitutional argument on the ground that a "notice-by-request" system was constitutionally adequate. *See* Appendix E, p. 19a, *infra*. The trial judge also held that ISCA's applications to the Board of Estimate did not toll the applicable statute of limitations and that ISCA's suit was barred because it was not brought within two years of the date of the filing of the tax foreclosure deed (Appendix E, p. 20a, *infra*).

The Appellate Division for the Second Department affirmed the trial court's decision in its entirety. On the constitutional issue, the court confirmed its earlier holding in *Matter of Tax Foreclosure No. 35*, 127 A.D.2d 220, 514 N.Y.S.2d 390 (2d Dep't 1987), *aff'd on other grounds*, 71 N.Y.2d 863, 522 N.E.2d 1044, 527 N.Y.S.2d 747 (1988), that the "notice-by-request" procedure satisfied constitutional standards. On the statute-of-limitations issue, the Appellate Division held that no proceeding to set aside the tax foreclosure deed could be initiated more than two years after the deed was recorded.

4. The Consolidated New York Decision

The Manhattan and Brooklyn appeals were heard together and a consolidated decision was rendered by the New York Court of Appeals. The court observed that the constitutionality of the "notice-by-request" procedure "presents us with an

issue explicitly left open by the United States Supreme Court in *Mennonite*'' and that the open issue ''has generated considerable litigation — with mixed results — both within this State and throughout the country'' (Appendix A, pp. 8a - 9a, *infra*) (footnotes omitted).

The court below concluded that searching property records ''would unquestionably impose a very substantial burden on the City.'' Appendix A, p. 10a, *infra*. It observed that, in addition to notices sent on request, the Administrative Code provided for mailings to the name and address appearing on the latest annual record of assessed valuations (Appendix A, p. 10a, *infra*). Although this provision had not resulted in notice to petitioners, the court said that the petitioners were, in its view, ''delinquent owners'' who had failed to update the City's billing records (Appendix A, p. 11a, *infra*). Because of these considerations, the court concluded that New York's ''notice-by-request'' procedure satisfies ''the minimum requirements of due process.'' Appendix A, p. 11a, *infra*.

With regard to the Brooklyn properties, the Court of Appeals held that the constitutional issue need not be reached because ISCA had not initiated a court proceeding within two years of the recording of the tax deed even though it had actual notice of that deed ''well within'' the two-year period. Appendix A, p. 5a, *infra*. Although ISCA had followed the procedure authorized by New York law — *i.e.*, an application to the Board of Estimate for the identical relief — the court below held that the two-year statute of limitations barred ISCA's lawsuit.

REASONS FOR GRANTING THE WRIT

1. This Case Presents an Unresolved Constitutional Issue That This Court Previously Reserved for Future Decision.

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), this Court held that a local government is constitutionally required to provide mortgagees whose identities are reasonably ascertainable with more personal notice of a potential foreclosure on real property for nonpayment of taxes than publication, posting and notification to the property owner. The Court's majority opinion held that a mortgagee of property that is to be the subject of a tax sale has a legally protected property interest that entitles him to "notice reasonably calculated to apprise him of a pending tax sale." 462 U.S. at 798.

The Court held that "[p]ersonal service or mailed notice" upon a record mortgagee is constitutionally required even though it is possible for such a creditor to learn whether property taxes have been paid on a property and whether tax foreclosures are likely. 462 U.S. at 799. The Court said that it was "a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party" to give him "[n]otice by mail or other means as certain to ensure actual notice" if the party's name and address are "reasonably ascertainable."462 U.S. at 800. In this case, it is undisputed that the petitioners' names and addresses were "reasonably ascertainable" from the New York City land records.

May the City avoid this obligation by a law that requires a property owner or mortgagee to file a registration card that is, in effect, a request to be notified? That question was anticipated by this Court in the *Mennonite Board of Missions*

case. The Indiana statute at issue in that case had been amended in 1980, after the case was begun, to provide for notice on request. *See* 462 U.S. at 793 n.2. The Court described the statutory change and observed, "Because the events in question in this case occurred before the 1980 amendment, the constitutionality of the amendment is not before us." *Id.*

The constitutionality of such an amendment is, however, presented by this record. The New York Court of Appeals recognized that the constitutionality of such a "notice-by-request" statute was an issue "explicitly left open by the United States Supreme Court in *Mennonite*" (Appendix A, p. 8a, *infra*), and it decided this constitutional question adversely to the petitioners. As we demonstrate below, other jurisdictions have disagreed with the result reached by the New York Court of Appeals. This Court should now resolve the issue left open in *Mennonite Board of Missions*.

2. Lower State and Federal Courts Are in Conflict Over the Proper Resolution of the Constitutional Issue.

The court below acknowledged that the constitutional issue reserved for later decision in this Court's *Mennonite Board of Missions* opinion has generated "mixed results." The rule in Indiana, New Jersey, Oregon and Idaho is that "notice-by-request" is not a constitutional substitute for actual notice if land records disclose an owner or current mortgagee of property that is to be foreclosed. Moreover, the United States Court of Appeals for the Fifth Circuit has rejected the constitutionality of a notice-by-request system not supplemented by actual mailed notice to reasonably identifiable owners and mortgagees.

In *Reeder & Associates v. Locker*, 542 N.E. 2d 1371 (Ind. App. 3d Dist. 1989), a mortgagee had not been notified of a county auditor's tax foreclosure sale even though his mortgage

was recorded. The Indiana statute in effect was the one described in footnote 2 of this Court's *Mennonite Board of Missions* opinion. It provided for notice to any mortgagee who has requested notice of foreclosure and agreed to pay a fee to cover the cost of such a notice. It was undisputed that the mortgagee had not filed a request, and that he received no notice.

The Indiana court rejected the county's argument that by authorizing notice on request, the State satisfied its constitutional obligation. The Indiana court interpreted this Court's *Mennonite* ruling as requiring "actual notice of tax sale" to a mortgagee "unless the mortgagee's address is not reasonably identifiable." 542 N.E.2d at 1374. The court held that because of the mortgagee's "legally protected property right," the county had to provide notice of the impending tax sale "whether or not the mortgagee complied with" the new statutory request procedure. *Id.*

The Court of Appeals of Oregon, sitting *in banc*, reached the same conclusion in *Seattle-First National Bank v. Umatilla County*, 77 Or. App. 283, 713 P.2d 33, *review denied* 300 Or. 704, 716 P.2d 33 (1986). In that case, a bank held a recorded lien on property that was the subject of a tax foreclosure action. It had failed, however, to file a request for notice, as authorized by Oregon statute. As a result, the bank was not notified of the foreclosure proceeding. The Oregon court observed that this presented the constitutional issue that had been reserved in the *Mennonite* case, and it ruled that the failure to file a request for a notice did not relieve the county of its constitutional obligation to provide notice. The court said (713 P.2d at 36; footnote omitted):

> Although *Mennonite* did not consider the amendment to the Indiana Code providing for requested notice to lienholders, we think that the Court's decision

would have been the same had it considered that provision.

New Jersey courts have adopted the same principle. In *Jefferson Township v. Block 447A, Lot 10,* 228 N.J. Super. 1, 548 A.2d 521 (App. Div. 1988), the court held that a statutory mechanism whereby a mortgagee could register to receive notice of potential foreclosure actions did not satisfy the constitutional prerequisite. The court said, "We conclude that a person's entitlement to the notice required by due process cannot be conditioned on the requirement that he request it" (548 A.2d at 524), and it invalidated the foreclosure deed.

Similarly, the Idaho Court of Appeals, addressing the constitutionality of an Idaho statute providing for notice of foreclosure to mortgagees only when they had requested notice, held that "[t]o the extent that [the statute] does not provide for notice to a mortgagee of record, who had not previously requested notice, the statute is constitutionally infirm for allowing deprivation of a property interest without due process." *Wylie v. Patton,* 720 P.2d 649, 653-54 (Idaho App. 1986).

The constitutional issue was canvassed exhaustively in a 1989 decision of the Court of Appeals for the Fifth Circuit, which reached a result directly opposed to that of the New York court in this case. In *Small Engine Shop, Inc. v. Cascio,* 878 F.2d 883 (5th Cir. 1989), a Fifth Circuit panel held "that due process requires more than the right to be heard on demand" (878 F.2d at 884). On this basis, the Fifth Circuit reversed a district court opinion that found "notice-on-request" to be constitutional — as had a Louisiana court in *Bankers Life Co. v. Shost,* 581 So.2d 563, 569 (La. App. 5th Cir. 1987).

The decision of the New York Court of Appeals in this case conflicts with the holdings of the Indiana, New Jersey, Oregon, and Idaho courts and with the ruling of the Fifth Circuit. The conflict requires resolution by this Court.[2]

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[2]As to one petitioner only (petitioner ISCA Enterprises), the New York Court of Appeals held that the due process challenge to the notice-by-request procedure was barred by the failure of ISCA to file its action within two years of the recording of the tax deed on its properties, notwithstanding that ISCA had filed its lawsuit promptly after the ruling of the Board of Estimate rejecting ISCA's request for release of its property. The court thus held that ISCA's due process challenge to the deprivation of its property was time-barred before the completion of the administrative proceedings that finally deprived ISCA of the property.

The court's peculiar statute-of-limitations ruling cannot stand as an adequate and independent state-law basis for the ruling against ISCA. The application of a state statute of limitations to cut off a federal constitutional claim for the deprivation of property *before the deprivation is finally consummated* clearly is contrary to federal policy. *Cf. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (adjudication of federal claim based on taking of property should await completion of state administrative proceedings to ensure that only a final state action is reviewed). Moreover, the issue of when a federal claim accrues for statute of limitations purposes is clearly a question of federal law even when state law supplies the relevant limitations period, *see, e.g., Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir.), *cert. denied sub nom. Nassau County Republican Comm. v. Cullen*, 483 U.S. 1021 (1987). Under the New York Court of Appeals' analysis, however, it would appear that ISCA's claim may have been time-barred before it accrued as a matter of federal law. *See Biddison v. City of Chicago*, 921 F.2d 724, 728 (7th Cir. 1991); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145-46 (9th Cir. 1986) (Kennedy, J.)

In addition, to the extent that the lower court's decision gives effect, under New York law, to a foreclosure that was wholly void because of a due process violation, it conflicts with this Court's decision in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), and *Armstrong v Manzo*, 380 U.S. 545, 552 (1965). The correct remedy under these decisions is to recognize that the foreclosure was a nullity regardless of later-acquired knowledge. For these reasons, the New York court's statute-of-limitations ruling cannot constitute an adequate and independent state-law basis for the court's rejection of ISCA's constitutional claims.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 6, 1991

APPENDIX A

In the Matter of ISCA Enterprises, Individually and as Successor in Interest and Assignee of Greater New York Savings Bank et al., Appellant, v City of New York et al., Respondents.

Linton Campbell et al., Respondents, v City of New York, Appellant.

Argued March 27, 1991; decided May 2, 1991

OPINION OF THE COURT

Kaye, J.

A former mortgagee in the first appeal and former property owners in the second, challenge the constitutionality of New York City's "notice-by-request" procedure for in rem tax foreclosure actions, asking that the tax deeds on the subject properties be declared void and their interests restored. We resolve both appeals in the City's favor, the first on the ground that petitioner mortgagee had actual notice in time to bring suit, and the second on the ground that the City's statutory scheme for giving notice to property owners met the requirements of due process. The factual record in the first case makes it unnecessary for us to consider whether the City's notice provisions would also meet due process requirements as to mortgagees.

The "In Rem" Procedure in General

Title 11 of the New York City Administrative Code makes available a summary tax foreclosure procedure whenever an outstanding tax lien has been unpaid for more than one year

(Administrative Code § 11-404[a]), and it sets forth the mechanics for notifying interested parties that this procedure has been initiated.

In rem actions are commenced by the filing of duplicate lists of delinquent taxes in the office of the clerk of the county in which the parcels are located (Administrative Code § 11-405[d]). Publication of a notice of foreclosure must be made at least once a week for six successive weeks in the City Record and in two newspapers published and circulated within the relevant county (Administrative Code § 11-406[a]). In addition to publication, the Commissioner of Finance must mail a copy of the notice to all owners, mortgagees, and lienors who have filed "owner's registration" or "in rem" cards (Administrative Code § 11-406[c]).

Owner registration cards must include the owner's name and mailing address, and are designed to enable the Commissioner to mail bills for taxes and other charges, as well as foreclosure notices, to the proper party in interest (Administrative Code § 11-416). In rem cards purport to provide mortgagees, lienors and others having an interest in the property — but not authorized to receive tax bills — with a means of receiving notice of any foreclosure action initiated by the Commissioner (Administrative Code § 11-417).

If no owner registration or in rem card is on file, the Commissioner must mail the notice to the name and address, if any, listed on the latest annual record of assessed valuations (Administrative Code § 11-406[c]).

For a period of 10 weeks from the date of first publication of the notice of foreclosure, any person claiming an interest in a parcel listed in that notice has the opportunity to redeem it by paying all delinquent taxes, interest and penalties (Administrative Code § 11-407[a]). Upon expiration of this

10-week period (the last date for redemption), any interested party may still redeem a parcel by payment of a 5% penalty in addition to the other charges. This window for redemption is open until the Commissioner is notified by Corporation Counsel that the preparation of the judgment of foreclosure has been commenced (Administrative Code § 11-407[c]).

An interested party may serve a verified answer within 20 days of the last date for redemption, thereby severing the action as to any parcel in which the defendant has pleaded an interest (Administrative Code § 11-409 [a]). If no answer is interposed — and none was in respect to any of the parcels involved in these appeals —the court, after satisfying itself that the City has complied with all procedural requirements, is directed to enter final judgment awarding the City possession of the parcels listed (Administrative Code § 11-412). The judgment must also contain a direction to the Commissioner of Finance to prepare, execute and record a deed conveying title to all affected parcels to the City.

For a period of two years from the date the tax deed is recorded, an owner or mortgagee may apply for release of the property (Administrative Code § 11-424[a]). If this application is made within four months of the filing date — and includes all requisite taxes, charges and penalties — the City must grant the release. If an application is made after this four-month period, but prior to the expiration of the two-year limitation, release of the property is within the discretion of the Board of Estimate.

Finally, title 11 contains what is in effect a Statute of Limitations, providing that, after a period of two years from filing, a tax foreclosure deed raises a conclusive presumption that the in rem foreclosure proceeding was conducted in accordance with all provisions of law relating thereto (Administrative Code § 11-412[c]). No action to set aside the tax deed may be commenced after the expiration of this two-year period.

Challenge by ISCA Enterprises

In May 1981, the City commenced an action to foreclose on all real property located in Kings County with tax delinquencies of more than one year. Approximately 17,000 parcels were involved.

ISCA Enterprises, at that time, was the mortgagee on two of those parcels, its interests duly recorded, but it did not receive any actual notice of the foreclosure action. It is uncontested that notice was published according to the provisions of title 11 and that the proper filing was made in the Kings County Clerk's office.

On July 28, 1983, the City acquired title to the two ISCA parcels under a deed executed by the Commissioner of Finance pursuant to a judgment of foreclosure. Tax deeds were recorded at this time. In addition, prior to July 1983, ISCA had become the owner of a third parcel that was also among those subject to the judgment of foreclosure.

ISCA became aware of the tax foreclosure, and the recording of the tax deeds, in December 1983, with more than a year and a half left to run on the two-year Statute of Limitations. Instead of commencing an action to set aside the tax deeds, however, ISCA elected to pursue an application for release with the Board of Estimate, making the required filing in October 1984. Release was denied in October 1987, after which ISCA brought the present action — a full four years after learning of the foreclosure. The petition alleged that ISCA had been denied due process in that it was not given notice reasonably calculated to apprise it of the pendency of the foreclosure action.

Supreme Court granted the City's motion to dismiss, finding that the cause of action accrued on December 1, 1983 at the latest. On that basis, the court concluded that the

instant action, commenced more than four years later, was time barred. The ruling was affirmed by the Appellate Division.

We now affirm the Appellate Division order. ICSA's actual notice of the foreclosure action well within the two-year limitation period precludes that party from challenging the conclusive presumption raised by the properly recorded foreclosure deed (*see*,Administrative Code § 11-412[c]). Having itself delayed commencement of its action for nearly four years from notice, ICSA cannot be heard to complain of a constitutional infirmity in the original notice procedure (*see, Town of Somers v. Covey*, 2 NY2d 250, 257-258, *cert denied* 354 US 916).

Nor is there merit in ICSA's two additional arguments. First, ICSA asserts that the suit could not have been brought prior to the exhaustion of administrative remedies. A claim that a statute is unconstitutional may be raised in a judicial proceeding without first exhausting the administrative review process *(see, Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375). *Matter of Tax Foreclosure No. 35* (71 NY2d 863) is not to the contrary. There, the property had been released to its former owner on payment of taxes, interest and penalties, which the owner elected not to make; in those circumstances, the owner could claim no deprivation of due process.

Second, ICSA asserts that the Board of Estimate procedure tolled the Statute of Limitations on the constitutional claim. There is no support for this position in the Administrative Code, which sets up the release procedure as a means of paying off all taxes and charges on the forfeited property. ICSA was free to bring its constitutional challenge regardless of its decision to pursue a release, and pursuit of that course should therefore have no tolling effect (*see, Board of Regents v Tomanio*, 446 US 478, 486-487; *see also, Craig v. Township*

of Ewing, 678 F Supp 1106, 1108 (D NJ]).

For these reasons we affirm the order of the Appellate Division upholding the dismissal of ISCA's petition without reaching the constitutional issues tendered for our review. While we understand that the adequacy of the City's "notice-by-request" provision has been a vexing issue particularly with respect to mortagees, the posture of the present case does not permit us to reach that issue.

Challenge by the Campbell Plaintiffs

Plaintiffs, owners of Manhattan real estate, brought this consolidated action to compel the determination of claims to that property pursuant to article 15 of the Real Property Actions and Proceedings Law. The action originally involved 23 parcels as to which ownership had been transferred to the City pursuant to tax foreclosure deeds. This appeal concerns only 13 of those parcels.

At that time the in rem foreclosure actions were commenced by the City, each parcel had an outstanding tax delinquency of at least 18 months; the City's tax deeds were recorded in the period from May 1977 to September 1980, and the original article 15 actions were commenced by plaintiffs in September 1986. As to the 13 parcels before us, Supreme Court granted plaintiffs' cross motion for summary judgment, declaring the judgment and deeds for those parcels void. The Appellate Division's affirmance of that portion of Supreme Court's decision forms the basis of this appeal. We now reverse and grant summary judgment to the City.

Preliminarily, the City again urges dismissal of the action because it was not brought within the two-year Statute of Limitations. The City's argument must be rejected.

Unlike the ISCA appeal, there is no evidence in this case that plaintiffs had actual notice in time to bring their action. Contrary to the City's assertions, a challenge to the constitutionality of a notice provision, where the party had no timely notice, is not barred by the Statute of Limitations; the City's cited cases do not hold otherwise (*see e.g., Weaver Sons Co. v Burgess*, 7 NY2d 172; *Meigs v Roberts*, 162 NY 371). That principle, an eminently fair one at least implicit in this Court's prior decisions, is followed in the majority of jurisdictions (*see, Benoit v Panthaky*, 780 F2d 336, 338-339 [3d Cir] [and cases cited therein]; *see also, Schroeder v City of New York*, 371 US 208, 210).

As alternative Statute of Limitations argument, the City claims that plaintiffs, chargeable with the knowledge that taxes must be paid on real property, should be deemed to have had actual knowledge of the foreclosure action because such action is the logical sequel to tax delinquency. That argument also must fail.

It is no longer true that an owner is chargeable with knowledge of all events affecting its property, a view exemplified by the rejected "caretaker" theory of property ownership (*see generally, Matter of McCann v Scaduto*, 71 NY2d 164, 174-176). Instead, the burden is on the party charged with giving notice, regardless of whatever "fault" may be assigned to the delinquent taxpayer. As the Supreme Court made clear: "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." (*Mennonite Bd. v Adams*, 462 US 791, 800.) The status of owner may still have some relevancy in determining whether the notice is adequate, but it is immaterial to the Statute of Limitations analysis (*see, Congregation Yetev Lev D'Satmar v County of Sullivan*, 59 NY2d 418,423; *see also, Sheehan v County of Suffolk*, 67 NY2d 52, 58-59, *cert denied sub nom. MacKechnie v County of Sullivan*, 478 US 1006).

Thus, in this case we reject the City's Statute of Limitations arguments and reach the issue whether the notice provision of Administrative Code § 11-406(c) comports with the requirements of due process. Because of the scheme of the code relating to property owners, we conclude that, as applied to the plaintiffs, it does.

In *Mullane v Central Hanover Trust Co.* (339 US 306, 314), the Supreme Court, balancing the interest of the State against the individual interest sought to be protected by the Due Process Clause, formulated the test we apply for determining the adequacy of notice; notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."

In the circumstances presented, notice by publication alone would unquestionably be insufficient. In *Mennonite Bd. v Adams* (462 US 791, 800, *supra*), where the *Mullane* balancing test was applied to real property tax proceedings, it was determined that notice by mail is a constitutional precondition to a proceeding that will adversely affect the property interest of any party whose name and address are reasonably ascertainable. Here, where the owner's name could be obtained through City records, it seems clear that constructive notice alone would be constitutionally deficient (*see, Matter of McCann v Scaduto,* 71 NY2d, at 176, *supra*).

But the code provides for more than notice by publication — it permits a property owner to file an "owner's registration card." The constitutionality of such a procedure — what plaintiffs characterize as the "notice-by-request" procedure — presents us with an issue explicitly left open by the United States Supreme Court in *Mennonite* (462 US, at 793, n 2 [the Indiana statute in issue was subsequently amended to provide for notice to interested parties who filed an annual registration card and paid an annual registration fee, and the Supreme Court declined to pass on the constitutionality of the amend-

ment]). That issue has generated considerable litigation — with mixed results — both within this State[1] and throughout the country.[2]

Of key importance in those cases where the notice-by-request procedure was held invalid was the language in *Mennonite* (462 US 791, 799, *supra*) that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." (*See, e.g., Wylie v Patton*, 111 Idaho 61, 65, 720 P2d 649, 653; *Seattle-First Natl. Bank v Umatilla County*, 77 Ore App 283, 290, 713 P2d 33, 37.) As applied in the notice-by-request context, that language has

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[1]*Compare, Matter of Foreclosure of Tax Liens by County of Erie*, 103 AD2d 636, 639-640 (4th Dept) (the constitutional obligation to provide adequate notice to mortgagees cannot be abrogated by requiring those parties to request notice) and *Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities*, 133 AD2d 30 (1st Dept), *aff'd on other grounds* 70 NY2d 831 (the procedure is constitutionally inadequate where the City had actual notice of mortgagee's interest, identity and whereabouts through status as named party in prior foreclosure action brought by that mortgagee), *with Matter of Tax Foreclosure No. 35*, 127 AD2d 220, 226 (2d Dept), *aff'd without reaching constitutional issue* 71 NY2d 863 (procedure is a "simple, efficient, and eminently fair" method of providing notice — but owner had actual notice within the two-year limitations period).

[2]*See, e.g., Small Engine Shop v Cascio*, 878 F2d 883 (5th Cir) (County Treasurer was constitutionally required to provide notice to mortgagees of record, whether or not they requested it); *Seattle-First Natl. Bank v Umatilla County*, 77 Ore App 283, 713 P2d 33, *review denied* 300 Ore 704, 716 P2d 758 (State's constitutional duty to provide notice cannot be abrogated by requiring mortgagee to request notice); *Wylie v Patton*, 111 Idaho 61, 720 P2d 649 (Idaho Ct App) (same); *Township of Jefferson v Block 447A, Lot 10*, 228 NJ Super 1, 548 A2d 521 (App Div) (holder of prior tax sale certificate entitled to actual notice despite failure to comply with request procedure); and *United States v Malinka*, 685 P2d 405, 408-409 (Okla Ct App) (*Mennonite* places the onus on the State to provide notice notwithstanding availability of request/notice procedures); *but see*, Note, *The Constitutionality of Request Notice Provisions in In Rem Tax Foreclosures*, 56 Fordham L Rev 1209 (1988) (request notice provisions strike a reasonable balance between the interests of the State and the rights of property owners).

been held to prohibit the State from shifting the burden of providing adequate notice to the interested party (*see, Small Engine Shop v Cascio*, 878 F2d 883, 884 [5th Cir]).

Unlike the notice-by-request statutes involved in the cited cases, however, the City Administrative Code provides for additional procedures by which property owners actually receive notice — by mail to the name and address appearing on the latest annual record of assessed valuations, the key record for the tax billing purposes (*see*, Administrative Code § 11-210 *et seq.; see also*, RPTL 502 [2]; *Cooper v Makela*, 629 F Supp 658, 661 [WD NY]).[3] Plaintiffs do not contest the City's assertion that notice was mailed to the names and addresses listed on the assessment roll entries pertaining to their properties; rather they allege that such information was not properly updated. There is no support for that contention in the record. More importantly, plaintiffs' challenge to the constitutionality of the statute itself must fail in light of this additional statutory mechanism for providing that property owners receive actual notice of a foreclosure.

In determining that these provisions are constitutionally adequate, we note that searching property records (at least in the form maintained at the time these actions were commenced), as plaintiffs request, would unquestionably impose a very substantial burden on the City; some 17,000 properties were involved in Kings County alone. Of course, the imposition of a burden on a municipality does not excuse it from taking reasonable steps to provide actual notice to owners whose interests have been duly recorded. But it is among the circumstances that may be taken into account, under *Mullane* and *Mennonite*, in determining whether the steps taken to give notice were reasonable.

Finally, it is also relevant that it is the delinquent owners

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[3]No filing fee is required, and no renewal is necessary.

themselves who are involved here. Some responsibility for maintaining current records is reasonably assigned to the owners, who should be alerted to the need to update their records by a failure to receive timely billing notices (*see,* Administrative Code § 11-416). Although that does not relieve the City of its burden to provide adequate notice, again it is a circumstance that may be considered in balancing the interests of the parties and determining whether notice provisions are reasonable

Under all of the circumstances presented in this case — where the burden of individually searching the title records would be onerous for the City, and where the City publishes notices, sends notices to those who have filed request cards and if no cards are filed, mails notices to the names and addresses on the assessment record — we conclude that the City Adminsitrative Code notice provisions satisfy the minimum requirements of due process. We therefore reverse the Appellate Division order and award summary judgment to the City as against plaintiff property owners.

Accordingly, as to ISCA Enterprises the order of the Appellate Division should be affirmed, with costs. As to the *Campbell* plaintiffs, the order of the Appellate Division should be reversed, with costs, the City's motion for summary judgment granted and the City declared to be the owner of the 13 subject parcels.

Chief Judge WACHTLER and Judges SIMONS, ALEXANDER, HANCOCK, JR., and BELLACOS concur; Judge TITONE taking no part.

In *Matter of ISCA Enters. v City of New York:* Order affirmed, with costs.

In *Campbell v City of New York:* Order reversed, with costs, defendant's motion for summary judgment granted, and defendant declared to be the owner of the 13 subject parcels.

APPENDIX B

Mo. No. 672

In the Matter of ISCA Enterprises, Inc.,
Appellant,

v.

The City of New York, *et al.*,
Respondents.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.

DECISION COURT OF APPEALS
JUL 9 1991

Mo. No. 684

Linton Campbell, *et al.*,
Respondents,

v.

The City of New York,
Appellant.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.

DECISION COURT OF APPEALS
JUL 9 1991

APPENDIX C

Supreme Court of the United States

No. A-249

ISCA Enterprises, et al.,
Petitioners

v.

City of New York, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 6, 1991.

/s/ Anthony M. Kennedy

Associate Justice of the Supreme
Court of the United States

Dated this 7th day of October, 1991.

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

Argued March 13, 1990

_____AD2d_____

THOMAS R. SULLIVAN, J.P.
STANLEY HARWOOD
VINCENT R. BALLETTA, JR.
ALBERT M. ROSENBLATT, JJ.

3418E

In the Matter of ISCA Enterprises, etc., appellant, v The City of New York, et al., respondents.

DECISION & ORDER

Michael A. Drobenare, Brooklyn, N.Y., for appellant.

Victor A. Kovner, Corporation Counsel, New York, N.Y. (Leonard Koerner, Alfred Weinstein and Rochelle H. Cohen of counsel), for respondents.

In a proceeding pursuant to CPLR article 78, *inter alia*, to vacate the City of New York's title to certain real property, the petitioner appeals from a judgment of the Supreme Court, Kings County (Bernstein, J.), entered July 20, 1988, which dismissed the proceeding.

ORDERED that the judgment is affirmed, with costs.

In July 1983, the City of New York acquired deeds to the premises known as 470, 480 and 500 Montgomery Street in Brooklyn pursuant to a judgment entered in an in rem tax

foreclosure action. The petitioner, who owned one of the premises and held mortgages on the others, asserted that it first became aware of the judgment in the foreclosure action in December 1983 and, in October 1984, applied to the Board of Estimate for release of the properties pursuant to the Administrative Code of the City of New York § 11-424. After its applications were denied in October 1987, the petitioner commenced the instant proceeding in December 1987 to set aside the deeds acquired by the City in the foreclosure action.

The City's motion to dismiss the proceeding on the ground that it was barred by the Statute of Limitations was properly granted. Pursuant to Administrative Code § 11-412(c), upon execution of the deeds to the City, the prior proceedings in the foreclosure action, including the notices issued, were presumptively regular and in accordance with the law. In this regard, we note that there is nothing in the record to substantiate the petitioner's claim that it had not been provided adequate notice of the underlying foreclosure action in accordance with the Administrative Code (*see, Matter of Tax Foreclosure No. 35*, 127 ADS2d 220, affd 71 NY2d 863). Since there was adequate notice provided in compliance with the Administrative Code, the presumption of regularity became conclusive two years from the date the deeds were recorded, that is, on July 28, 1985, and no action could be maintained thereafter to set aside the deeds. Thus, the presumption in Administrative Code § 11-424(c) operates as a two year Statute of Limitations and bars this proceeding (*see, Lily Pond Enters. v City of New York*, 149 AD2d 412; *Matter of Tax Foreclosure No. 35, supra*).

We note that the petitioner was aware of the foreclosure action a little over four months after the deeds were acquired by the City and therefore could have commenced an action well within the two-year period. We find no support in the language of the relevant provisions of the Administrative Code

for petitioner's argument that it was required to wait for the Board of Estimate to act on its applications under Administrative Code § 11-424 before commencing this proceeding.

SULLIVAN, J.P., HARWOOD, BALLETTA and ROSENBLATT, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the matter of the Application of ISCA ENTERPRISES, individually and as successor in interest to and assignee of THE GREATER NEW YORK SAVINGS BANK and THE FULTON SAVINGS BANK,

Petitioner,

for a Judgment pursuant to Article 78 of the CPLR, directing,

THE CITY OF NEW YORK, PAUL CROTTY, as Commissioner of HOUSING, PRESERVATION and DEVELOPMENT, ABRAHAM BIDDERMAN, as Commissioner of Finance of THE CITY OF NEW YORK,

Respondents,

to stay and vacate the denial of THE CITY OF NEW YORK for the return of certain real property known as 470, 480, and 500 Montgomery Street, Brooklyn, New York to Petitioner; and to vacate any transfer of title to Municipal Respondents.

AARON D. BERNSTEIN,
Justice
INDEX NO. 37042/87
OUR FILE NO. M-1713
DATE: June 24, 1988

The petitioner moves by notice of petition dated December 8, 1987, and the petition of ISCA Enterprises verified November 9, 1987, for a judgment vacating the action taken by respondent whereby the City secured title.

The respondents cross move by notice of cross-motion dated March 3, 1988 and affirmation of Rochelle H. Cohen, Esq., dated March 2, 1988, for a judgment dismissing the petition on the grounds that it is barred by the statute of limitations.

The petitioner submits the affirmation of David J. Rosenblum, Esq., dated March 17, 1988 in opposition to the cross-motion.

It appears, without contradiction, that respondent City of New York (CITY) secured title to the various described parcels on July 28, 1983. The statute of limitations prescribed in Sec. 11-412(c) of the Administrative Code is that after two years no action can be commenced to set the deed aside.

On October 13, 1984, the petitioner applied to the Board of Estimate for a release of the subject parcels. The Board of Estimate did not render a decision on that application until October 27, 1987. Thereafter, within one month this proceeding was commenced.

Firstly, the petitioner contends that since he is the recorded mortgagee, it was required to receive actual notice of the in rem proceeding. This contention is rejected. This contention has been rejected by this Court in a prior application. *Perez v. City of New York* (Sup. Ct., Kings County, Index #2109/1987)

It further appears that the petitioner had actual notice of the proceeding on December 1, 1983. At the very best, the petitioner could only claim that the statute started to run from December 1, 1983, the day it got actual notice.

Secondly, the petitioner claims the statute of limitations was tolled during the period that the application for redemption was pending before the Board of Estimate. It is conceded at oral argument that the statute of limitations of §11-421 of the Ad-

ministrative Code would be a complete bar to any relief sought by the petitioner if the statute of limitations was not tolled by the provisions or §11-424 of the Administrative Code.

The court concludes that the statute of limitation was *not* tolled.

Firstly, there is a definite period of limitations for both sections. In §11-421 there is a two year period from "the issuance of any certificate or written instrument", whereas the period of limitation of §11-424 is two years from "the date of the deed by which the City acquired title to each property, was recorded"

The Court's initial reaction was that the two sections were interdependent but, on further reflection, the Court reached the conclusion as urged by the respondent, that these are two separate and individual proceedings. If they were interdependent, the statute of limitations would have provided for the tolling in §11-412 during the proceedings under §11-424. This observation leads to the inevitable conclusion that these proceedings are independent of each other and that the statute of limitation is not tolled.

Accordingly, the petition is dismissed.

ENTER

_____

J.S.C.

Filed
JULY 20 1988
KINGS COUNTY CLERK

APPENDIX F

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 14, 1990

Present — Hon. Francis T. Murphy, Presiding Justice
John Carro
E. Leo Milonas
Sidney H. Asch
Richard W. Wallach, Justices.

40125

Linton Campbell, Rapjoe Realty Corp., Michelle Assets, Inc., R & J Realty Corp., Ro-Malik Enterprises Ltd., 441-445 East 116th Street, Inc., Kingdom Properties Inc., Diamond Properties, Inc.,

Plaintiffs-Respondents,

against

The City of New York,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from an order and judgment (one paper) of the Supreme Court, New York County (Leonard Cohen, J.), entered on February 2, 1990, which, in consolidated actions commenced by plaintiffs for a declaration that they are the sole owners of 23 subject real estate parcels, obtained by defendant pursuant to ***in rem*** tax foreclosure proceedings, ***inter alia***, held in abeyance a determination as to defendant's motions, and plaintiffs' cross-motion, for summary judgment regarding six of the subject parcels and severed those actions; granted

that part of plaintiffs' cross-motion seeking to strike defendant's affirmative defense of statute of limitations under Administrative Code Sec. 11-412; and further granted that part of plaintiffs' cross-motion insofar as it declared plaintiffs to be the sole owners of fourteen of the subject parcels,

And said appeal having been argued by Pamela Seider Dolgow of counsel for appellant, and by Richard Jankell of counsel for respondents; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same hereby is modified, on the law, to the extent of reversing that part of the order which denied defendant's motion for summary judgment to dismiss the claims of the owners of parcels numbered 3, 10, 17, 20, 21 and 22, and otherwise affirmed, without costs and without disbursements.

ENTER:
E. CHAGAN WOLFE
Deputy Clerk.

Murphy, P.J., Carro, Milonas, Asch, Wallach, JJ.

40125

Linton Campbell, *et al.*,
Plaintiffs-Respondents, R. Jankell

against

The City of New York,
Defendant-Appellant. P.S.Dolgow

Order and judgment (one paper), Supreme Court, New York County (Leonard Cohen, J.), entered February 2, 1990, which, in consolidated actions commenced by plaintiffs for a declaration that they are the sole owners of 23 subject real estate parcels, obtained by defendant pursuant to ***in rem*** tax foreclosure proceedings, ***inter alia,*** held in abeyance a determination as to defendant's motions, and plaintiffs' cross-motion, for summary judgment regarding six of the subject parcels and severed those actions; granted that part of plaintiffs' cross-motion seeking to strike defendant's affirmative defense of statute of limitations under Administrative Code Sec. 11-412; and further granted that part of plaintiffs' cross-motion insofar as it declared plaintiffs to be the sole owners of fourteen of the subject parcels, unanimously modified, on the law, to the extent of reversing that part of the order which denied defendant's motion for summary judgment to dismiss the claims of the owners of parcels numbered 3, 10, 17, 20, 21 and 22, and otherwise affirmed, without costs.

Defendant City of New York ("the City") claims, and we agree, that with respect to six of the parcels in issue on this appeal, specifically parcel numbers 3, 10, 17, 20, 21 and 22, it gave the owners thereof actual notice of the ***in rem*** fore-

closure proceedings against them. Consistent with our rationale and holding in *Matter of Tax Foreclosure Action No. 33, City of New York (Babe Realty, Inc.)*, 141 AD2d 437 (1st Dept. 1988), *appeal dismissed*, 73 NY2d 915, we find that plaintiffs' bare denial of receipt of the subject foreclosure notices is insufficient to overcome the presumption of regularity of the actual notice given, particularly when juxtaposed with the judgments of foreclosure, which were annexed to the City's summary judgment motion, and included full recitations of the affidavits of mailing. We further note that the City's answer in the within action contains copies of the pertinent portions of the mailing lists maintained by the Department of Finance, indicating by Tax Map Block and Lot the names and addresses of the parties to whom the foreclosure notices were submitted. We are also mindful of the City's unrebutted assertion that these lists were created contemporaneously with the mailing of the subject notices.

Accordingly, we modify the order of the IAS court, to the extent of granting defendant's motion for summary judgment dismissing the claims of the owners of parcels 3, 10, 17, 20, 21 and 22, where the owners, who had filed ***in rem***, cards, received actual notice of foreclosure, and otherwise affirm, without costs, for the reasons stated by the IAS court (Leonard Cohen, J.).

Order filed.

APPENDIX G

SUPREME COURT, NEW YORK COUNTY
IAS PART 23

Index No. 47236/86

LINTON CAMPBELL, RAPJOE REALTY CORP., MICHELLE ASSETS, INC., R & J REALTY CORP., RO-MALIK ENTERPRISES LTD., 441-445 EAST 116TH STREET, INC., KINGDOM PROPERTIES INC., DIAMOND PROPERTIES, INC.,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

LEONARD N. COHEN, J.:

The City of New York (the "City") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint in these consolidated actions and granting declaratory relief that it is the sole owner of the subject real properties. Plaintiffs cross-move for an order striking defendant's affirmative defenses and granting summary judgment in their favor.

These nine consolidated actions were brought pursuant to Article 15 of the Real Property Actions and Proceedings Law ("RPAPL") to determine title to the subject 23 parcels of real property located in Manhattan. Each of the parcels was purportedly conveyed to the City pursuant to a deed made and delivered as the result of a judgment in an *in rem* tax forclosure action. The outstanding tax liens on the subject

properties ranged from $2,374.97 to $12,999.64. Plaintiffs have alleged their willingness to redeem the properties by payment of all of the taxes due to date. Except for plaintiff owners of parcels 1, 2 and 15, the plaintiffs in these actions claim to be the fee owners of the various parcels, the deeds to which have been duly filed and recorded prior to the commencement of the *in rem tax* foreclosure actions against each parcel of real property. As for parcels 1, 2 and 15, the plaintiff owners acquired them after the City filed a list of delinquent taxes and commenced an *in rem* action. All plaintiffs alleged that they were not given legally sufficient notice of the inclusion of their respective properties in the various *in rem* actions through which title to their properties was purportedly acquired by the City. As plaintiffs assert that they were not afforded adequate due process notice of the proceedings, they contend that the deeds by which the City acquired title are null and void and should be set aside. Although the City asserts that it fully complied with the notice requirements set forth in Title II, Chapter 4 of the Administrative Code of the City of New York, plaintiffs argue that the said statute is unconstitutional in that it fails to furnish adequate notice of the pendency of *in rem* tax foreclosure actions to readily ascertainable owners of record sufficient to meet minimal standards of due process of law.

Pursuant to New York City Administrative Code §11-405, *in rem* actions are commenced by the filing of two duplicate originals of the List of Delinquent Taxes in the Office of the County Clerk of New York County. In addition, certified copies of the List of Delinquent Taxes must be filed in the borough office of the City Collector and in the office of the Corporation Counsel (Administrative Code §11-405 [f]). Upon filing the List — the Commissioner of Finance must cause a notice of foreclosure to be published at least once a week for six successive weeks in the City Record and in two newspapers published in and circulated throughout the county in which the

affected properties are located (Administrative Code §11-406 [a]). Furthermore, the Commissioner of Finance must mail a copy of the notice of foreclosure to all owners, mortgagees, lienors or encumbrancers who are entitled to receive such notice by virtue of having filed an owner's registration or *in rem* card in the office of the City Collector, pursuant to Administrative Code §§11-416 and 11-417. In the absence of such filings, notice shall be sent to the name and address appearing in the latest annual record of assessed valuations (Administrative Code §11-406[c]).

The City argues, in support of its motion, that the notice-by-request provision of the Administrative Code is sufficient to pass constitutional muster. From a practical point of view, the City argues that an unreasonable and staggering burden would be placed upon the City if it were required to conduct formal title searches and other searches of public records in order to ascertain the identities and addresses of all holders of interests in properties named in *in rem* tax foreclosure actions for the purpose of giving mail notice of such foreclosure actions to all interested parties. The City cites statistics showing that from 1978-1988, a total of 136,243 parcels located throughout the five boroughs were the subject of *in rem* actions.

In opposition to the motion, plaintiffs contend that it is unfair to place the burden on a property owner, mortgagee or other person having an interest in the realty whose name and whereabouts are readily ascertainable to file an *in rem* or owner's registration card with the City Collector in order to request that they receive actual notification. However, it appears that some plaintiffs did, in fact, file such registration cards (see, Marton affirmation, Ex. B). The City alleges that notices were mailed to the owners of six of the 23 parcels which are the subject of this aciton (Parcel #3, 10, 17, 20, 21, 22). The owners, however, deny receipt of such notice.

This action requires the court to confront squarely an issue discussed, but expressly not reached, by the Supreme Court of the United States, in *Mennonite Bd. of Missions v Adams* (462 US 791, 103 Sup Ct 2706, 77L. Ed.2d 180 [1983]) i.e., the constitutional validity of notice-by-request in *in rem* tax foreclosure actions. The Appellate Divisions for the Fourth Department and Second Department have addressed the issue and reached contradictory holdings (compare *Matter of Foreclosure of Tax Liens by County of Erie (Manufactureers & Traders Trust Co.)*, 103 AD2d 636, 481 NYS 2d 547 [4th Dept 1984] (holding that notice-by-request provisions is insufficient, and that the State cannot meet its constitutional duty to provide notice to persons before divesting them of their property by shifting the burden to the property owner to request notice [103 AD2d at 640]); and *Matter of Tax Foreclosure No. 35, The City of New York [Wilson]*, 127 AD2d 220, 514 NYS 390 [2d Dept 1987] (upholding the notice-by-request provision a prior balancing of the State's interest in collecting delinquent taxes through tax sales and in avoiding the costly and time-consuming burden of ascertaining the identity and location of any person with a legally protected interest by resorting to a title search for each delinquent parcel against the burden imposed on the property owner by means of the "minor step of the filing of a card," [127 AD2d at 226]).

In its only ruling on the subject, the Appellate Division, First Department vacated a judgment of foreclosure and sale based upon an *in rem* tax foreclosure where the only notice given to the owner was by publication. The court found that the City had a duty to provide actual notice of the *in rem* tax foreclosure action to the mortgagee whose identity it had *actual* notice of by virtue of the fact that the mortgagee had *pro forma* joined the City in a mortgage foreclosure action involving the same property (Alliance Property Mgmt. & Dev., Inc.

v. Andrews Ave. Equities, Inc., 133 AD2d 39, 518 NYS 2d 804 [1st Dept 1987], affd 70 NY2d 831, 523 NYS2d 441 [1987]).

In *Mennonite*, the Supreme Court struck down Indiana's tax sale statute — which did not then provide for any notice of the tax sale to mortgagees, other than by publication — on the ground that such notice did not meet the requirements of the Due Process Clause of the 14th Amendment. Prior to the argument before the Supreme Court, Indiana amended its statute to provide for the mailing of notice if the interested party registered his or her name, address and a description of the property with a designated official.* However, since that amendment went into effect subsequent to the sale in question, the Supreme Court noted that the constitutionality of the provisions was not before the court (462 US at 793, n. 2).

The New York State Court of Appeals has structly followed *Mennonite* in declaring unconstitutional the provisions of the Nassau County Administrative Code, which failed to provide property owners with actual notice of tax lien sales (McCann v. Scaduto, 71 NY2d 164, 524 NYS 2d 398 [1987]). However, it appears that the Nassau County provision involved in *McCann*, like the Indiana Statute which the Supreme Court struck down in *Mennonite*, made no provision for owners, mortgagees, et al, to request notification in advance, unlike the provision of the New York City Administrative Code before this court. Neither the majority decision nor the dissent in *McCann* refers to the First, Second or Fourth Department cases mentioned *supra*, although all had been previously decided.

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*The constitutionality of Indiana's amended notice-by-request statute was upheld in a lower court decision (*Homemakers Fin. Serv. Inc. v. Jones*, No. 83-18-56-C [USDC, S.D. Ind. 1984]).

In *Matter of the Foreclosure of Tax Liens by the County of Erie, (supra)*, the Appellate Division, Fourth Department held as follows:

> "The *Mennonite* decision (*supra*) reaffirmed the principles established in *Mullane v Central Hanover Trust Co.* (339 US 306), holding that where a property interest is at stake, a party must be afforded that degree of notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Where the property owner's name and address are readily ascertainable, notice by publication must be supplemented by mailed notice* (*Mullane v Central Hanover Trust Co., supra*, p. 315).
>
> "In *Mennonite (supra)*, the Supreme Court clearly stated that the *onus is on the State to provide notice, notwithstanding that the mortgagee, which is often a sophisticated creditor, might take steps to protect its own interest. '[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation'* (*Mennonite Bd of Missions v Adams*, 462 US 791)" (103 AD2d at 639, emphasis added).

In *Tax Foreclosure No. 35* (*supra*), the Appellate Division, Second Department expressly took cognizance of but respectfully disagareed with the Fourth Department's holding in the *County of Erie* case. The Second Department applied a "balancing of interests test," and held as follows:

> "[T]he drafters of the provisions of the Administrative Code of the City of New York have established a simple, efficient, and eminently fair method for an interested party to obtain personal notice of any direct attack upon his or her possessory

> or proprietary rights by means of the minor step of the filing of a card by the interested party. Unlike the statute construed in *Mennonite, supra,* which provided no method for personal service upon the party there affected, the Administrative Code provides a simple means for obtaining actual notice. We consider the distinction critical.
>
> * * *
>
> Our reading of the Supreme Court cases leads us to conclude that due process does not require the State to save a party from its own failure to act reasonably in protecting its own interests. In sum, we hold that applying a balancing of interests test, the Administrative Code provisions pertaining to notice are such as to satisfy the requirements of due process'' (127 AD2d at 226-227).

The First Department, in its decision in *Alliance Property,* (*supra*), noted that the Second and Fourth Departments had reached different conclusions in addressing the issue of the validity of notice-by-request. The First Department summarized these differing holdings as follows:

> ''[T]he Fourth Department found New York's notice scheme constitutionally inadequate because the state 'has an obligation to all mortgagees, not merely those who request notice' (103 AD2d 636, 640). However, the Second Department recently upheld New York's in rem notice provision as a reasonable balance between the state's interest in collecting taxes, without the costly and time consuming burden of conducting a title search to identify parties with an interest in the delinquent parcel, and the property rights of those parties (Matter of Tax Foreclosure No. 35, The City of New York [Wilson], 127 AD2d 220 [Niehoff, J.P., 1987])'' (133 AD2d at 31-32).

The First Department then quoted from *Mennonite:* "Where a property owner's identity and whereabouts are readily ascertainable, notice by publication is not sufficient" (133 AD2d at 32). The First Department also cited *Schroeder v City of New York* (371 US 208 [1962]), which held that "notice by publication was deemed inadequate to apprise a property owner of condemnation proceedings *where her name and address were readily ascertainable from the deed record and tax rolls*" (Ibid, emphasis added).

It is undisputed that the identity and whereabouts of the plaintiff fee owners, other than for owners of parcels 1, 2 and 15, were set forth on each of the recorded deeds filed in the Register's Office of New York County prior to the commencement of the *in rem* tax foreclosure actions. Further, plaintiffs contend that they did not receive any actual notice by mail or personally of the impending tax foreclosure action.

It appears to this court, based upon its reading of the above-mentioned cases, that the procedure set forth in the New York City Administrative Code for affording notice by publication and actual notice only on request to owners, mortgagees and others claiming an interest in real property which is the subject of an *in rem* tax foreclosure action, is insufficient to afford adequate due process notice to such parties. Therefore, this court finds that said provisions of the Administrative Code deny due process to readily ascertainable interested parties. As the Court of Appeals held in *McCann:* "the concept that publication affords due notice in all *in rem* proceedings has been markedly eroded over time" (71 NY2d at 173).To the extent that the Second and Fourth Departments of the Appellate Division differ, this court believes that the holding of the Fourth Department in *County of Erie* (*supra*) more closely comports with evolving standards of due process, as indicated by the decision of the Appellate Division, First Department in *Alliance*

Property (*supra*), and the Court of Appeals in *McCann* (*supra*).

In view of the lack of due process notice to those readily ascertainable plaintiffs, the City cannot rely upon the 2-year "finality" provision of the Administrative Code and the statute of limitations defense (*McCann, supra*). It is noted in this regard that this court, by Justice Pecora, consolidated these actions but denied the City's motion to dismiss which relied on a statute of limitations bar arising from the finality provisions of the Administrative Code § 11-412(c) (Campbell et al v. City of New York, Supreme Court, NY County, Index #47238/87. Memorandum Decision, September 1987. Order entered December 22, 1987, Pecora, J.). The Appellate Division unanimously affirmed this decision without opinion (Campbell et al v. City of New York #33723, Appellate Division, Supreme Court, 1st Dept May 5, 1988).

The City, in support of its motion to dismiss then pending before Justice Pecora, relied on Administrative Code §11-412(c) which provides for a conclusive presumption that all notices required by law are regular after two years from its recording of tax foreclosure deeds and bars actions to set aside such deeds after two years of such recording. It is undisputed here that the tax foreclosure deeds were recorded more than five years prior to the commencment of these actions. Nevertheless, the Appellate Division of this Department unanimously affirmed the trial court's denial of the motion to dismiss wherein the trial court expressly held "where a property owner's identity and whereabouts are readily ascertainable, notice by publication is not sufficient" and that "it is clear herein that the names and addresses of the plaintiffs were readily ascertainable from the deeds on record. Inasmuch as defendant, City, has failed to establish notice was given by other means besides publication, the plaintiffs are not now barred from challenging the deeds obtained without adequate

notice." The trial court relied on *Alliance supra* as the pivotal precedent for its finding of lack of due process notice.

The court finds that prior to the commencement of the *in rem* actions herein the names and addresses of the owners of all parcels, except 1, 2, 15, were reasonably and readily ascertainable from deed records in the context of modern computerization and instantaneous data retrieval. Consistent with case law hereinabove, this court finds that the City has a constitutional obligation to provide actual notice to such readily ascertainable plaintiff owners and not merely to those who request notice.

Accordingly, plaintiffs' cross-motion for summary judgment is granted to the extent of declaring the judgments and deeds for those parcels for which actual notice by mail was not given to the owners null and void and they are vacated and set aside (i.e., parcels #4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 18, 19 and 23). The respective plaintiffs are declared the legal owners thereof.

To the extent the City alleges that actual notice was sent by mail to the owners of six parcels (#3, 10, 17, 20, 21 and 22) who filed *in rem* cards, and the latter has denied receiving such notice, a traverse hearing is directed on the issue of whether such notices were, in fact, sent. The court notes that if such mailing was made, service is deemed complete regardless of whether or not the party for whom it was intended actually received it (Barton v La Pointe, 67 AD2d 760 [3d Dept 1979]). Where, as here, there is a sworn denial of service, the party alleging service (in this case, the City) must establish that service was effected by a preponderance of the evidence at a hearing (see, Skyline Agency Inc. v Ambrose Coppotelli, Inc., 117 AD2d 135, 139 [2d Dept 1986]). Therefore, the actions involving these six parcels are severed and the issue of whether notice of the *in rem* foreclosure ac-

tions was mailed to those owners is referred to the Legal Support Office for assignment to a Special Referee to hear and report with recommendations. Pending receipt of the report and a motion pursuant to CPLR 4403, final determination of the motion and cross-motion for summary judgment as to those six (6) parcels is held in abeyance. Counsel are directed to file a copy of this decision with the Clerk of the Legal Support Office, 60 Centre Street, Room 311, for the purpose of obtaining a calendar date.

As to the owners of the parcels #1, 2 and 15, since they acquired their interests in the properties after the City filed notice of pendency equivalents and commenced the *in rem* proceedings in which these three parcels were foreclosed, they are chargeable with notice thereof and cannot claim that they were not notified by mail. The filing of a notice of pendency is constructive notice to the entire world, and, as expressly provided in CPLR 6501, "[a] person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he were a party" (122 W. 109 Street Corp. v City of New York, ____ Misc 2d ____ [Sup Ct NY Co 1987], n.o.r. Index No. 15644/86 (Pecora, J.) *affd w/o op.*, ____ AD2d ____, 536 NYS2d 361 [1st Dept 1988]). It would work an unreasonable and unnecessary burden on the City to have to perform a title search in order to ascertain the existence and identity of possible parties having an interest in properties which are the subject of *in rem* proceedings prior to foreclosure where such parties acquired their interset subsequent to the City's filing of a notice of pendency or the equivalent thereof. In such a situation, the burden properly belongs on the party acquiring an interest in real property to perform a thorough search. This is the theory underlying our recording statutes.

Accordingly, the City's motion for summary judgment is

granted as to the owners of parcels #1, 2 and 15, and the complaints in those actions are dismissed, and the City is declared the legal title owner thereof. In all other respects, the City's motion for summary judgment is denied. The cross motion by owner plaintiffs of parcels 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 18, 19 and 23) for summary judgment is granted as hereinabove.

Settle order in accordance with the foregoing.

Dated: September 28, 1989.

J.S.C.
/s/
LEONARD N. COHEN

APPENDIX H

PERTINENT PORTIONS OF NEW YORK CITY ADMINISTRATIVE CODE

Admin. Code § 11-406 provides in relevant part:

> c. On or before the date of the first publication of such notice, the commissioner of finance shall cause a copy of the notice to be mailed to all owners, mortgagees, lienors or encumbrances, who may be entitled to receive such notice by virtue of any owner's registration or in rem card filed in the office of the city collector pursuant to section 11-416 or 11-417 of this chapter. If such owner's registration or in rem cards have not been filed in the office of the city collector then said notice shall be mailed to the name and address, if any, appearing in the latest annual records of assessed valuations.

Admin. Code § 11-416 provides in relevant part:

> § 11-416 Owner's registration cards; mailing tax bills and notices to registered owners or their designee.
>
> a. The commissioner of finance shall maintain a file of owner's registration cards submitted by owners of real property. Each such owner's registration card shall be signed by the owner or a duly authorized representative and shall state the date of which it was filed, the owner's full name and post office address and a description of the premises by reference to the section, block, and lot numbers on the tax map.
>
> * * *
>
> c. The commissioner of finance shall also mail notice of foreclosure and any other process required

by this chapter to all owners who have filed owner's registration cards whenever the parcels as to which such cards were filed are included in a list of delinquent taxes filed pursuant to this chapter. The failure to receive such notice or process as herein provided shall not affect the validity of any action or proceeding brought pursuant to this chapter.

Admin. Code § 11-417 provides in relevant part:

§ 11-417 In rem cards; mailing notices to other interested persons.

a. The commissioner of finance shall, in addition to the file maintained by him or her pursuant to section 11-416 of this chapter, maintain a file of in rem cards submitted by any person having an interest in real property who is not entitled to have tax bills mailed to him or her by the commissioner of finance, including mortgagees, lienors, encumbrancers and owners who have filed owner's registration cards designating someone else to receive bills and notices. Each such in rem card shall be signed by the person filing such card or a duly authorized representative, shall contain a description of the premises by reference to the section, block and lot numbers on the tax map and shall state the date on which said card was filed, the full name and post office address of the person filing said card and the nature of the interest said person has in said premises.

b. The commissioner of finance shall mail a notice of foreclosure and any other process required by this chapter to each person who has filed an in rem card whenever the parcels to which such cards refer are included in a list of delinquent taxes filed pursuant to this chapter. However, failure to receive such notice or process shall not affect the validity of any proceeding brought pursuant to this chapter.

Supreme Court, U.S.
FILED
FEB 7 1992
OFFICE OF THE CLERK

(2)

No. 91-915

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ISCA ENTERPRISES, RAPJOE REALTY CORP., MICHELLE ASSETS, INC., RO-MALIK ENTERPRISES, LTD., 441-445 EAST 116TH ST., INC., DIAMOND PROPERTIES, INC.,

Petitioners,

v.

THE CITY OF NEW YORK, FELICE MICHETTI, as Commissioner of Housing Preservation and Development, CAROL O'CLEIREACAIN as Commissioner of Finance of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 7, 1992

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In a proceeding where petitioner ISCA Enterprises concedes that it had actual knowledge of the foreclosures four months after the City took title to the properties and well-within the two-year period in which an action to set aside the deeds could have been timely commenced, whether the dismissal of its Article 78 petition, commenced over four years later, on statute of limitations' grounds independently and adequately supports the judgment below thus depriving this Court of jurisdiction to review the case?

2. Whether New York City's in rem tax foreclosure statute, which, in addition to publication and posting, requires that mail notice of tax foreclosure actions be given to those owners who have filed owner's registration cards and to other interested

parties who have filed in rem cards with the Commissioner of the New York City Finance Department and, in the absence of such cards, to the name and address appearing in the latest annual record of assessed valuations, comports with the requirements of procedural due process?

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(1) THE DISMISSAL OF THE ISCA ENTERPRISES' PETITION ON STATE STATUTE OF LIMITATIONS' GROUNDS INDEPENDENTLY AND ADEQUATELY SUPPORTS THE JUDGMENT BELOW THUS DEPRIVING THIS COURT OF JURISDICTION TO REVIEW THE CASE.	18

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(2)

THE CITY'S IN REM STATUTORY SCHEME WHICH, IN ADDITION TO PUBLICATION AND POSTING, REQUIRES NOTICE OF FORECLOSURE TO BE MAILED TO ALL OWNERS OR OTHER INTERESTED PARTIES WHO HAVE FILED OWNER'S REGISTRATION AND/OR IN REM CARDS OR, IN THE ABSENCE OF SUCH CARDS, TO THE NAME AND ADDRESS APPEARING IN THE LATEST ANNUAL RECORD OF ASSESSED VALUATIONS, FULLY COMPORTS WITH DUE PROCESS.

THE NEW YORK COURT OF APPEALS, WHILE DECLINING TO ADDRESS THE CONSTITUTIONALITY OF THE PROVISION AS RELATING TO MORTGAGEES IN THE ISCA LITIGATION, FOUND THE STATUTE CONSTITUTIONAL AS APPLIED TO THE CAMPBELL PETITIONERS, ALL PROPERTY OWNERS, IN LIGHT OF THE CODE'S ADDITIONAL STATUTORY MECHANISM FOR PROVIDING THAT PROPERTY OWNERS RECEIVE ACTUAL NOTICE OF A FORECLOSURE. THAT DECISION IS FULLY IN ACCORD WITH THIS COURT'S PRECEDENTS AND PRESENTS NO CONFLICT WITH DECISIONS IN OTHER JURISDICTIONS. 33

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No. 91-915

IN THE
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OCTOBER TERM, 1991

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Petitioners,

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THE CITY OF NEW YORK, FELICE MICHETTI, as Commissioner of Housing Preservation and Development, CAROL O'CLEIREACAIN as Commissioner of Finance of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

1. Introduction

A former mortgagee and property owner in the case of ISCA Enterprises v. The City of New York, et al., and five former property owners in the case of Campbell, et

al. v. The City of New York,[1] brought separate actions below challenging the constitutionality of New York City's "notice-by-request" procedure for in rem tax foreclosure actions, asking that the tax deeds on the subject properties be declared void and their interests restored.

The New York Court of Appeals heard the cases together and issued a consolidated decision holding in the ISCA Enterprises case that the proceeding was time-barred since petitioner mortgagee and owner "had actual notice in time to bring suit," and in

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[1] Plaintiff Campbell is not a party to this petition. Rapjoe Realty Corp., Michelle Assets, Inc., Ro-Malik Enterprises, Ltd., 441-445 East 116th St., Inc., Diamond Properties, Inc., all plaintiffs in the consolidated Campbell action are petitioners here. For the sake of clarity, and to avoid confusion with the ISCA Enterprises case, which was never consolidated with Campbell except for decision in the Court of Appeals, we will continue to refer to the Campbell litigation separately.

the Campbell case that "the City's statutory scheme for giving notice to property owners met the requirements of due process."

In so holding, the Court of Appeals expressly noted that, unlike other notice-by-request statutes, "the City Administrative Code provides for additional procedures by which property owners actually receive notice-by-mail to the name and address appearing on the latest annual record of assessed valuations, the key record for tax billing purposes." The factual record in the ISCA Enterprises case made it unnecessary for the Court of Appeals to consider whether the City's notice provisions would also meet due process requirements as to mortgagees. Thus, the issue that petitioners contend was expressly left open by Mennonite Board of Missions v. Adams, 462 U.S. 791, 793 n.2 (1983), and

purports to form the basis for the instant petition, is not presented by this record.

2. New York City's "In Rem" Procedure

Title 11 of the New York City Administrative Code provides for a summary tax foreclosure procedure whenever an outstanding tax lien has been unpaid for more than one year. Administrative Code §11-404[a]. It also sets forth the procedures for notifying interested parties that such a proceeding has been commenced. These procedures are detailed in the Court of Appeals' decision appearing in Petitioners' Appendix A at 1a-3a.

In addition to the requirement that lists of delinquent taxes be filed in the office of the County Clerk (Admin. Code §11-405[3]), as well as in the borough office of the city collector and in the office of the Corporation Counsel (Admin. Code §11-405[f]), the statute provides (1) that upon filing the

list, the Commissioner of Finance shall publish a notice of foreclosure at least once a week for six successive weeks in the City Record and in two newspapers published in and circulated throughout the county in which the affected properties are located (Admin. Code §11-406[a]); and (2) that the Commissioner shall mail a notice of foreclosure to all owners, mortgagees, lienors or encumbrancers who have filed owner's registration or in rem cards pursuant to sections 11-416 and 11-417 of the Administrative Code or, in the absence of such filings, to the name and address appearing in the latest annual record of assessed valuations (Admin. Code §11-406[c]).

Owner registration cards include the owner's name and mailing address (or that of the owner's designee) and are designed to enable the Commissioner to mail bills for

taxes and other charges, as well as foreclosure notices, to the proper party in interest (Admin. Code §11-416). In rem cards may be submitted by any person who is not authorized to receive tax bills, including mortgagees, lienors, encumbrancers, and by owners who have filed owners registration cards designating someone else to receive bills and notices (Admin. Code §11-417). There is no charge for the filing of such cards and they need not be renewed. The failure of the Commissioner to send notice to the names and addresses on file results in the withdrawal of the affected parcels from the foreclosure proceeding. Admin. Code 11-413(a)(3).

For a period of 10 weeks from the date of first publication of the notice of foreclosure, any person claiming an interest in a parcel listed in that notice has the

opportunity to redeem it by paying all delinquent taxes, interest and penalties (Admin. Code §11-407[a]). Upon expiration of this period, an interested party may still redeem a parcel by payment of a 5% penalty in addition to the other charges. This window for redemption is open until the preparation of a judgment of foreclosure has been commenced (Admin. Code §11-407[c]).

An interested party may serve a verified answer within 20 days of the last day for redemption. The service of an answer severs the action as to any parcel in which the defendant has pleaded an interest (Admin. Code §11-409[a]). If no answer is interposed, the court, after satisfying itself that the City has complied with all procedural requirements, is directed to enter final judgment awarding the City possession of the parcels listed (Admin. Code §11-412). The judgment must also contain a direction

to the Commissioner of Finance to prepare, execute and record a deed conveying title to all affected parcels to the City.

After the tax deed is recorded, an owner, mortgagee or other interested party has a period of two years to apply for release of the property (Admin. Code §11-424[a]). If an application is made within four months of the filing date, and all charges owed are paid, the City must grant the release. If an application is made after this four-month "mandatory release" period, but prior to the expiration of the two-year limitation, release of the property is within the discretion of the Board of Estimate.[2]

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[2] The Board of Estimate was dissolved on August 31, 1990 pursuant to this Court's decision in Board of Estimate v. Morris, 489 U.S. 688 (1989). However, it was functioning during all the relevant events occurring here. Release applications are now reviewed by the newly-created In Rem (Footnote Continued)

The Administrative Code further provides that a tax deed "shall be presumptive evidence that the action and all proceedings therein ... and all notices required by law were regular and in accordance with all provisions of law relating thereto." Two years from the recording of the deed the presumption becomes conclusive (Admin. Code, §11-412(c). No action to set aside the tax deed may be commenced after the expiration of this two-year period. Id.

3. The ISCA Enterprises' Litigation

In May 1981, the City of New York commenced an in rem tax foreclosure action to foreclose on all real property located in Kings County with tax delinquencies of more than one year; some 17,000 parcels were listed.

(Footnote Continued)
Foreclosure Release Board. See, Admin. Code §11-424.1 (Local Law 16, 1991).

ISCA Enterprises was the mortgagee on two of these parcels; at some time prior to July of 1983, it became the holder of a deed to a third parcel included in the foreclosure action. There was neither answer nor redemption. On July 28, 1983, the City acquired title to the parcels by deed executed pursuant to judgment entered in the action and recorded the same day.

According to petitioner, it became aware of the foreclosures on or about December 1, 1983, with more than a year and a half left to run on the two-year Statute of Limitations. However, instead of commencing an action to set aside the tax deeds, ISCA Enterprises elected only to file applications for release with the Board of Estimate pursuant to section 11-424 of the Administrative Code. The applications were filed in October 1984 and were subject to the Board of Estimate's discretion. On October

29, 1987, the Board of Estimate denied the applications.

On December 9, 1987, a full four years after learning of the foreclosure, ISCA Enterprises commenced an Article 78 proceeding in the Supreme Court, Kings County. In substance, petitioner sought to set aside the City's tax deeds resulting from in rem tax foreclosure on the ground that it had been denied due process in that it had been given insufficient notice of the action.

By Notice of Motion dated March 3, 1988, the City moved to dismiss the proceeding on the ground that it was time-barred pursuant to section 11-412(c) of the Administrative Code since it was brought more than two years after the recording of the City's tax deed.

Supreme Court granted the City's motion to dismiss, finding that ISCA's cause of action accrued, at the latest, on December

1, 1983. The Court held that the instant action, commenced more than four years later, was time-barred. The Appellate Division, Second Department, affirmed.[3]

4. **The Campbell Litigation**

Eight former owners of some 23 parcels of real estate located in the Borough of Manhattan, City of New York, brought actions, later consolidated, to compel determination of claims to real property pursuant to Article 15 of McKinney's Real Property Actions and Proceedings Law. New York City had commenced in rem tax

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[3] On appeal in the Appellate Division, Second Department, petitioner urged reversal on two-grounds: (1) that "[t]he Court below erred in ruling that the statute of limitations under §11-412[c] had not been tolled by the petitioner's application before the Board of Estimate under §11-421[b] and §11-424"; and (2) that "[r]espondent City of New York, should be estopped from relying upon the statute of limitations under §11-412[c]." No constitutional issues were raised or addressed.

foreclosure actions with respect to each of these parcels and the City's tax deeds were recorded in the period from May 1977 to September 1980. At the time the in rem foreclosure actions were commenced, each parcel had a tax delinquency of 18 months or more.

The instant actions were commenced in September 1986 challenging the adequacy of the notice provisions contained in New York City's tax foreclosure statute, each plaintiff contending that it did not receive notice of the inclusion of its respective properties in the various in rem actions through which title to their former properties was acquired by the City.

It is undisputed that the individual actions comprising this consolidated action were commenced between six and 10½ years after the City's tax deeds were recorded. At the time of commencement of these

actions, plaintiffs had not paid their property taxes for seven to 12 years or more.

As to 13 of the 23 parcels, Supreme Court, New York County, granted plaintiffs' cross-motion for summary judgment, declaring the judgment and deeds for those parcels void. The Appellate Division, First Department, affirmed that portion of the judgment. Only these 13 parcels, formerly owned by five corporate plaintiffs,[4] were the subject of the appeal to the New York State Court of Appeals.

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[4] These five plaintiffs, Rapjoe Realty Corp., Michelle Assets, Inc., Ro-Malik Enterprises, Ltd., 441-445 East 116th St., Inc., and Diamond Properties, Inc., are petitioners here.

OPINION OF THE NEW YORK STATE COURT OF APPEALS

The ISCA Enterprises and Campbell appeals were heard and decided together, both in favor of the City of New York.

(1)

With respect to ISCA Enterprises, the New York Court of Appeals expressly declined to reach the constitutional issue raised, holding that the proceeding was untimely. The Court stated that ISCA's actual notice of the foreclosure action well within the two-year limitation period precluded it from challenging the conclusive presumption raised by the properly recorded foreclosure deed under Administrative Code §11-412(c). The Court concluded that "[h]aving itself delayed commencement of its action for nearly four years from notice, ISCA cannot be heard to complain of a constitutional infirmity in the original notice procedure." The Court rejected ISCA's

argument that the Statute of Limitations was tolled while it pursued its administrative remedy before the Board of Estimate, noting that "ISCA was free to bring its constitutional challenge regardless of its decision to pursue a release, and pursuit of that course should have no tolling effect." Nor was ISCA required to exhaust administrative remedies before pursuing its constitutional challenge.

The Court concluded:

> For these reasons we affirm the order of the Appellate Division upholding the dismissal of ISCA's petition without reaching the constitutional issues tendered for our review. While we understand that the adequacy of the City's "notice-by-request" provision has been a vexing issue particularly with respect to mortgagees, the posture of the present case does not permit us to reach that issue.

(2)

The Court of Appeals did reach the constitutional issue tendered by the plaintiffs

in the Campbell litigation, holding that the scheme of the Administrative Code relating to property owners comports with the requirements of due process. In analyzing the statute under this Court's holdings in Mullane v. Central Hanover Trust Co., 330 U.S. 306 (1950) and Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), the Court noted that, unlike other notice-by-request statutes that have been held invalid, "the City Administrative Code provides for additional procedures by which property owners actually receive notice-by-mail to the name and address appearing on the latest annual record of assessed valuations, the key record for tax billing purposes."

The Court concluded that "plaintiffs' challenge to the constitutionality of the statute itself must fail in light of this additional statutory mechanism for providing

that property owners receive actual notice of foreclosure."

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE DISMISSAL OF THE ISCA ENTERPRISES' PETITION ON STATE STATUTE OF LIMITATIONS' GROUNDS INDEPENDENTLY AND ADEQUATELY SUPPORTS THE JUDGMENT BELOW THUS DEPRIVING THIS COURT OF JURISDICTION TO REVIEW THE CASE.

(1)

This Court has adhered unwaveringly to the principle that it will not review judgments of state courts that clearly rest on adequate and independent state grounds. Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Coleman v. Thompson, ___ U.S. ____, 111 S. Ct. 2546 (1991).

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide [such cases]." Id. at 1040.

This Court articulated the rationale for this rule in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945):

> It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

Thus, the "independent and adequate state ground" rule has been described as "a corollary of the fundamental principle that

the Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. §1257." Stern, Gressman, Shapiro, Supreme Court Practice, Sixth Ed. p. 169. This rule applies whether the state law ground is substantive or procedural. Coleman v. Thompson, supra, 111 S.Ct. at 2554.

Since Michigan v. Long, supra, 463 U.S. 1032, this Court, in determining whether state court references to state law constitute adequate and independent state grounds, will no longer look beyond the opinion under review, or require state courts to reconsider cases to clarify the grounds of their decision but, instead, requires a "plain statement" by the Court below as to the basis of its decision.

Here, the New York Court of Appeals could not have been clearer as to the basis of its decision. In deciding the ISCA Enterprises case, the Court held that ISCA's "actual notice of the foreclosure action well within the two-year limitation period precludes that party from challenging the conclusive presumption raised by the properly recorded foreclosure deed," citing New York City Administrative Code §11-412(c). The Court held that "[h]aving itself delayed commencement of its action for nearly four years from notice, ISCA cannot be heard to complain of a constitutional infirmity in the original notice procedure." The Court cited its own prior opinion in Town of Somers v. Covey, 2 N.Y.2d 196, app. dismd. and cert. denied, 354 U.S. 916 (1957), as authority for that proposition.

Thus, the Court held, in effect, that ISCA's failure timely to bring suit within the

two-year limitation period, when it clearly could have done so, acted as a procedural bar to foreclose consideration of ISCA's constitutional claims. Thus, the Court dismissed ISCA's petition "without reaching the constitutional issues tendered for our review." While acknowledging that the adequacy of the City's notice-by-request statute has been a "vexing issue particularly with respect to mortgagees", the Court concluded that "the posture of the present case does not permit us to reach this issue."

The Court's determination that ISCA's claim was time-barred constitutes an adequate and independent state ground for the judgment below and divests this Court of jurisdiction to hear this case.

This Court has declined jurisdiction under the "adequate state ground" doctrine even when the state procedural rule served to bar federal review of a constitutional

claim, as here. Thus, only recently in Coleman v. Thompson, supra, 111 S. Ct. 2546, this Court held that the doctrine applied to bar federal habeas corpus when the state court declined to address the prisoner's federal claims because he had failed to meet a state procedural requirement. In so holding, this Court noted that while it "has long understood the vital interest served by federal procedural rules, even when they serve to bar federal review of constitutional claims," it was now time to recognize, even in the habeas context, that "no less respect should be given to state rules of procedure." Id. at 2565-2566. See also Monger v. Florida, 405 U.S. 958 (1972) (where challenge to constitutionality of state statute was barred on state procedural grounds, this Court denied certiorari "it appearing that judgment of the Supreme Court of Florida rests upon

an adequate state ground." There, the defendant had filed a notice of appeal prior to entry of judgment in the case and his appeal was dismissed on that technicality barring consideration of his First Amendment claims).

There can be no question but that there is a significant interest served by a state procedural rule that bars litigants from asserting stale claims. Indeed, in Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980), this Court recognized:

> "The importance of policies of repose in the federal, as well as in the state system is attested to by the fact that when Congress has provided no statute of limitations for a substantive claim which it created, this Court has nonetheless "borrowed" what it considered to be the most analogous state statute of limitations to bar tardily commenced proceedings... This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere

> creation of a "cause of action" or "claim for relief" that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established. Thus, in general, state policies of repose cannot be said to be disfavored in federal law.

Indeed, the state rule is consistent with federal law. This Court has held that a constitutional claim can become time-barred just as any other claim can. "Nothing in the Constitution requires otherwise." Block v. North Dakota, 461 U.S. 273, 292 (1983).[5]

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[5] Even if, arguendo, the question of when a cause of action accrues for statute of limitations' purposes under a state statute providing a state remedy is itself a federal question, as petitioners suggest (we think erroneously), application of the federal rule would achieve the same result here. Under federal law, a cause of action accrues when the plaintiff "knows or has reason to know" of his injury. See Cullen v. Margiotta, 811 F.2d 698, 725 (2d Cir. 1987), cert. denied sub nom Nassau County Republican Comm. v. Cullen, 483 U.S. 1021 (1987). Since
(Footnote Continued)

ISCA argued below that the fact that it filed a release application for discretionary release of its property with the Board of Estimate pursuant to section 11-424 of the Administrative Code and awaited the outcome of that process before bringing suit, in effect, tolled the running of the Statute of Limitations on its constitutional claim, and that it was required to exhaust this administrative remedy before bringing suit. The Court of Appeals considered, and properly rejected, both arguments.

In rejecting the argument that ISCA was required to exhaust it's administrative remedies before bringing suit, the Court properly held, citing New York cases, that a

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(Footnote Continued)
ISCA concedes that it had actual knowledge of the foreclosures by December 1983, its action, commenced over four years later, is clearly time-barred under the two-year statute of limitations set forth in the Administrative Code.

claim that a statute is unconstitutional may be raised in a judicial proceeding without first exhausting the administrative review process. Looking to the administrative code provision itself, the Court also rejected ISCA's argument that the Board of Estimate procedure tolled the Statute of Limitations on the constitutional claim.[6]

ISCA contends that the application of a state statute of limitations to cut off a federal constitutional claim for the deprivation of property "before the

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[6] The Court did also cite to this Court's decision in Board of Regents v. Tomanio, supra, 446 U.S. 478, 486-487 which held, under New York law, that the petitioner's time to commence a §1983 action was not tolled during the pendency of her state administrative and judicial remedies. This Court applied not only New York's statute of limitations but its tolling provisions as well, noting that under New York law the time for filing an action is not tolled during the period in which a litigant pursues a related but independent cause of action.

deprivation is finally consummated" is contrary to federal policy, citing Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (Pet. at 12, n.2). That case is wholly inapposite here. There, the respondent had alleged that the County Planning Commission had taken its property without just compensation by its failure to approve plats proposing further development. This Court held that respondent had not yet obtained a final decision regarding the application of the Tennessee ordinance and regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, and its claim, therefore, was not ripe for review. Significantly, a takings claim, by its very nature, could not mature before that point. Here, in contrast, ISCA's constitutional challenge to the adequacy of

the notice provisions under which its property was foreclosed constituted an independent cause of action which was ripe for review at the time the City's deed of foreclosure was recorded, irrespective of what happened on its release application. Since the administrative code provides that any action to set aside the tax deed must be brought within two years of its recordation, and makes no provision for tolling during the pendency of a release application, the Court of Appeals properly found, on state law grounds, that ISCA's challenge was untimely.

For all of the above-stated reasons, this Court is without jurisdiction to hear ISCA's claims.

(2)

If this Court disagrees, and finds that the ISCA judgment is not supported by an adequate and independent state ground, we acknowledge that, under those circumstances, the State Court's failure to consider the constitutional issue presented necessarily operates as a denial of the claim. While we urge that the City's notice-by-request statute is constitutional and is fully consistent with this Court's decision in Mennonite Board of Missions v. Adams, supra, 462 U.S. 791, we do recognize that some jurisdictions have invalidated similar notice-by-request provisions as applied to mortgagees and other lienors. See cases cited in Petition at 9-11.[7] Even so, until the New York Court

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[7] We submit that the courts in these cases (Footnote Continued)

of Appeals actually rules on the issue, we

(Footnote Continued)
misconstrued this Court's holding in Mennonite. We do not believe that Mennonite can be read to invalidate all notice procedures which merely require the affirmative act of putting one's name on file. Indeed, in another context, a notice-upon-request statute was upheld by this Court in the face of a due process challenge. Lehr v. Robertson, 463 U.S. 248 (1983). Rather, what was rejected in Mennonite was the argument that notice by mail was unnecessary because a mortgagee could find out for itself whether or not the mortgaged parcel was in tax arrears. Under the City's tax law, the City has not relieved itself of the obligation to provide notice by mail. The City is merely using the card system as an efficient means of identifying various interests in real property so that actual notice can be provided. The burden placed on a person with interest in property to file a card with the Commissioner of Finance is no different than requiring the recordation of such interest. As compared with this rather minimal burden, the corresponding burden which would be imposed upon the City by the necessity of searching public records to determine the identity of interest holders would be staggering. New York City has over 900,000 tax parcels and an extremely high tax delinquency rate. In the Brooklyn foreclosure action alone, over 17,000 parcels were involved. The card system strikes a

(Footnote Continued)

would submit that no clear decisional conflict with these other jurisdictions is presented requiring resolution by this Court. Under such circumstances, certiorari should be denied. See Stern, Gressman, Shapiro, Supreme Court Practice, Sixth Ed., §4.3, p. 196.

(Footnote Continued)
reasonable balance between the government's vital interest in enforcing tax obligations swiftly and inexpensively and the property rights of a party with an interest in the parcel.

II.

THE CITY'S IN REM STATUTORY SCHEME WHICH, IN ADDITION TO PUBLICATION AND POSTING, REQUIRES NOTICE OF FORECLOSURE TO BE MAILED TO ALL OWNERS OR OTHER INTERESTED PARTIES WHO HAVE FILED OWNER'S REGISTRATION AND/OR IN REM CARDS OR, IN THE ABSENCE OF SUCH CARDS, TO THE NAME AND ADDRESS APPEARING IN THE LATEST ANNUAL RECORD OF ASSESSED VALUATIONS, FULLY COMPORTS WITH DUE PROCESS.

THE NEW YORK COURT OF APPEALS, WHILE DECLINING TO ADDRESS THE CONSTITUTIONALITY OF THE PROVISION AS RELATING TO MORTGAGEES IN THE ISCA LITIGATION, FOUND THE STATUTE CONSTITUTIONAL AS APPLIED TO THE CAMPBELL PETITIONERS, ALL PROPERTY OWNERS, IN LIGHT OF THE CODE'S ADDITIONAL STATUTORY MECHANISM FOR PROVIDING THAT PROPERTY OWNERS RECEIVE ACTUAL NOTICE OF A FORECLOSURE. THAT DECISION IS FULLY IN ACCORD WITH THIS COURT'S PRECEDENTS AND PRESENTS NO CONFLICT WITH DECISIONS IN OTHER JURISDICTIONS.

The petition should be denied as to the Campbell petitioners as well. Contrary to

petitioners' assertions, the Campbell case does not present the issue which petitioners contend was reserved for future decision by this Court in Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).

In Mennonite, this Court held that the conducting of a tax sale of a parcel of real property without having given prior actual notice to a mortgagee identified in a publicly-recorded mortgage constituted a violation of the procedural due process rights of the mortgagee. The Indiana statute under scrutiny there provided for notice by publication and posting and notice by certified mail only to the owner at his last known address. The statute contained no provision for actual notice to mortgagees.

The underlying lawsuit in Mennonite was an action to quiet title brought by the tax sale purchaser some four months after the expiration of the redemption period.

The mortgagee, who had not learned of the tax sale until one week after the expiration of the redemption period, opposed the purchaser's motion for summary judgment on the ground that it had not received constitutionally adequate notice of the pending tax sale. Id. at 795. Looking to its landmark decision in Mullane v. Central Bank & Trust Co., 339 U.S. 306 (1950), this Court found that since the mortgagee possessed a legally-protected property interest that would be significantly affected by a tax sale (Id. at 800):

> he is entitled to notice reasonably calculated to apprise him of a pending tax sale. [Citation omitted.] When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does

not satisfy the mandate of Mullane.

This Court noted that in 1980 Indiana revised the statute to provide for notice by certified mail to any mortgagee of real property which is subject to tax sale proceedings, if the mortgagee requested such notice and agreed to pay a fee. However, this Court expressly declined to pass upon the constitutionality of the 1980 amendment because the events in question occurred earlier. 462 U.S. at 793 n.2.[8]

The constitutionality of a notice-by-request statute as applied to mortgagees, the

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[8] The amended statute was subsequently repealed by Indiana, P.L. 83-1989, §18, effective May 5, 1989. It should be noted that the Indiana statute, unlike New York City's more protective statute, required the mortgagee to renew its registration annually and to pay a fee. In New York City, registration need be done only once, and no fee is required. See, Admin. Code, §§11-416 and 11-417.

issue left open by Mennonite, is not presented by the Campbell litigation which involved only property owners. While we would submit that the City's notice-by-request statute satisfies minimum due process standards with respect to both owners and mortgagees,[9] the Court of Appeals only considered the constitutionality of the statute with respect to owners.

As previously noted, section 11-406(c) of the New York City Administrative Code provides that, in addition to posting and publication, the commissioner of finance shall mail notice of foreclosure to all owners, mortgagees, lienors or encumbrancers who

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[9] See Tax Foreclosure No. 35, The City of New York [Wilson], 127 A.D.2d 220, 514 N.Y.S.2d 390, aff'd on other grds., 71 N.Y.2d 863, 527 N.Y.S. 2d 747, 522 N.E.2d 1044 (1988); Note, The Constitutionality of Request Notice Provisions in In Rem Tax Foreclosure, 56 Fordham L. Rev. 1209 (1988).

have filed owner's registration cards or in rem cards pursuant to section 11-416 or 11-417. However, if such owner's registration or in rem cards have not been filed, "then said notice shall be mailed to the name and address, if any, appearing in the latest annual record of assessed valuations." Admin. Code, §11-406(c).

Referring to this provision, the Court of Appeals found that, unlike other notice-by-request statutes, "the City Administrative Code provides for additional procedures by which property owners actually receive notice by mail to the name and address appearing on the latest annual record of assessed valuations, the key record for tax billing purposes." The Court concluded:

> Plaintiffs do not contest the City's assertion that notice was mailed to the names and addresses listed on the assessment roll entries pertaining to their properties;

> rather they allege that such information was not properly updated. There is no support for that contention in the record. More importantly, plaintiffs' challenge to the constitutionality of the statute itself must fail in light of this additional statutory mechanism for providing that property owners receive actual notice of a foreclosure.

Thus, contrary to petitioners' contentions, New York's holding is not in conflict with other state and federal courts over the resolution of the constitutional issue left unresolved by Mennonite. Every case cited by petitioners involved mortgagees or lienors, not owners. See, Reeder & Associates v. Locker, 542 N.E.2d 1371 (Ind. App. 3d Dist. 1989); Seattle-First National Bank v.Umatilla County, 77 Or. App. 283, 713 P.2d 33, review denied, 300 Or. 704, 716 P.2d 33 (1986); Jefferson Township v. Block 447A, Lot 10, 228 N.J. Super. 1, 548 A.2d 521 (App. Div. 1988); Wylie v. Patton, 720 P.2d 649, 653-54 (Idaho App. 1986);

Small Engine Shop, Inc. v. Cascio, 878 F.2d 883 (5th Cir. 1989).

Since New York's statutory scheme provides for additional procedures by which property owners actually receive notice -- by mail to the name and address appearing on the assessment roll, the Court of Appeals properly found the above-cited cases distinguishable.[10]

Thus, the Court of Appeals, following applicable precedents in this Court, including Mennonite, properly held in the Campbell case that the City Administrative Code provisions satisfy the requirements of

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[10] Indeed, many jurisdictions have the same or similar methods for providing notice. See, e.g., McKinney's Real Property Tax Law, §1002 (notice "to be sent by first class mail to the name and address of the owner or occupant, as shown on the assessment roll"); Ind. Code Ann. §6-1.1-24-4 as discussed in Mennonite, supra, 462 U.S. at 793 (notice should be mailed to owner's "last known address").

due process as to property owners. Petitioners' constitutional claim is insubstantial and the petition should be denied.

(3)

In sum, contrary to petitioners' assertions, this record does not present the issue that this Court, in Mennonite, reserved for a future day, nor is the Court of Appeals' decision in conflict with the decisions of other state or federal courts. Thus, the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

February 7, 1992

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Supreme Court, U.S.
FILED
FEB 21 1992
OFFICE OF THE CLERK

No. 91-915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ISCA ENTERPRISES, RAPJOE REALTY CORP., MICHELLE ASSETS, INC., RO-MALIK ENTERPRISES, LTD., 441-445 EAST 116TH ST., INC., DIAMOND PROPERTIES, INC.,
Petitioners,

v.

THE CITY OF NEW YORK, FELICE MICHETTI, as Commissioner of Housing Preservation and Development, CAROL O'CLEIREACAIN, as Commissioner of Finance of the City of New York,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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PETITIONERS' REPLY BRIEF

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February 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York[1]

PETITIONERS' REPLY MEMORANDUM

INTRODUCTION

Respondents concede that the constitutional adequacy of statutes limiting notice of tax foreclosure actions to persons who have affirmatively requested notice is an issue that this Court reserved in *Men-*

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[1] Notwithstanding the respondents' caption, this case seeks review of a decision of the New York Court of Appeals.

nonite Board of Missions v. Adams, 462 U.S. 791 (1983), and that numerous state and federal appellate courts have held that notice-by request schemes do not comport with due process. Moreover, respondents do not—and cannot—deny that the New York Court of Appeals explicitly reached and decided a federal constitutional issue when it rejected the due process challenge to the application of the notice-by-request provisions of the New York City Administrative Code to five of the petitioners in this case. However, despite their apparent recognition of the importance of the issue reserved in *Mennonite Board of Missions* and of the divergent results lower courts have reached in applying *Mennonite Board*'s due process analysis to notice-by-request statutes, respondents ask the Court to bypass the issue in this case. None of the reasons respondents advance has merit.

ARGUMENT

1. Owners Are Also Entitled to Constitutionally Adequate Notice.—Respondents contend that, with respect to the five petitioners whose due process claims were explicitly considered and rejected by the New York court, the issue presented is not precisely the same as that addressed by the other courts that have rejected the constitutionality of notice-by-request statutes. Respondents stress that the five petitioners in this case were *owners* of the foreclosed property, while the parties in the cases that have struck down notice-by-request statutes were all *mortgagees* or other lienholders.

Respondents' observation, while factually accurate, does not remotely serve to distinguish the cases. Clearly, if notice-by-request is not adequate for mort-

gagees, it follows *a fortiori* that it does not suffice for owners, whose constitutionally protected property interest is even greater. Thus, respondents' contention that this case does not present the issue reserved in *Mennonite Board* and decided in the state and federal cases striking down notice-by-request statutes is false.[2]

Respondents further contend that, as to owners, the New York City code is distinguishable from the statutes struck down by other courts in that it provides an additional avenue of notice: namely, the mailing of notice to the name and address listed in the latest annual record of assessed valuations. Again, however, this is not a genuine distinction. It is undisputed that this procedure did not, in this case, result in notice being mailed to the current owners of the property. The New York court rationalized this lack of notice by stating that it was *up to the owners* to "maintai[n] current records" and "update their [*i.e.*, the City's] records." Pet. App. 11a.

In other words, the lower court placed on the owners the obligation to take affirmative action to ensure that they would receive notice in the event of foreclosure. The mailing of notice only to persons listed in the record of assessed valuations is simply notice-by-request in another guise. Unless the property owner has advised the City that he is the one to

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[2] Indeed, the New York Court of Appeals itself noted that this case "presents us with an issue explicitly left open by the United States Supreme Court in *Mennonite*." Pet. App. 8a. Thus, respondents' assertion that "the *Campbell* case does not present the issue which petitioners contend was reserved for future decision by this Court in *Mennonite*" (Brief in Opp. 34) is contradicted by the very decision respondents seek to defend.

whom notice should be sent, he is not assured of notice of foreclosure even though his identity is clearly discernible from properly recorded deeds in the relevant land records.

Thus the purported "distinction" relied upon by respondents is a mere illusion. The issue decided below is precisely the same as that decided by other courts that have confronted notice-by-request statutes: "[W]hether the State may, consistent with the Constitution, prospectively shift the entire burden of ensuring adequate notice to an interested property owner regardless of the circumstances." *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 884 (5th Cir. 1989). The New York Court of Appeals' affirmative answer to that question is, as demonstrated in our petition for certiorari, contrary to the rulings of numerous other courts and presents an issue deserving of resolution by this Court.

2. There Is No Adequate and Independent State Ground.—Because the remaining petitioner, ISCA Enterprises, was a mortgagee of the foreclosed property, respondents concede that the application of New York City's notice-by-request scheme to ISCA presents, on its face, precisely the constitutional question reserved by *Mennonite Board* and subsequently addressed by the lower court decisions cited in the petition for certiorari. However, respondents contend that the New York court's ruling was based on an adequate and independent state-law ground. New York City Administrative Code § 412(c) provides that the presumption that a foreclosure was regular and in accordance with law becomes "conclusive" two years after the deed was recorded and that no action to set aside such a deed may be maintained unless

it is commenced "prior to the time that the presumption becomes conclusive."

The New York Court of Appeals itself recognized that this "conclusive presumption" could not bar an action by a party that did not have actual notice of the deed within the two-year period. (*See* Pet. App. 7a.) However, the court held that because ISCA had initiated an administrative proceeding after obtaining actual notice and then filed suit more than two years after it had such actual notice, the two-year "presumption" of Section 412(c) precluded the action. The court reached this result despite the fact that ISCA's delay in filing suit was attributable to the City's inability to determine an available administrative claim for release of the property. Through no fault of ISCA's, the process occupied more than three years. The New York court's ruling in effect requires a party who learns that its property interest has been foreclosed without notice to rush into court to assert a federal constitutional claim without availing itself of an administrative remedy that would return the property without the burdens of litigation and without the need for adjudication of constitutional issues. The penalty for failure to do so is the forfeiture of all federal challenges to the foreclosure in the event that the administrative proceeding is dragged out *by the City* for more than two years.

Contrary to respondents' contention, such a ruling is by no means an "adequate and independent" state-law basis for the rejection of ISCA's constitutional claims. *First*, the "conclusive presumption" of regularity afforded a deed obtained through procedures violating elemental due process notice requirements must fall together with the constitutional infirmity of

the deed. Such a "presumption" is not by its own terms a statute of limitations and therefore cannot possibly constitute an "adequate" state-law ground for decision insulating the underlying constitutional flaw from review. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) (rejecting constitutionality of Texas procedure creating presumption of correctness for a judgment entered without notice or other requisites of due process).

Second, even if the "conclusive presumption" of regularity relied upon by the New York court were properly characterized as a statute of limitations, such a limitation does not automatically cut off federal claims but is only "borrowed" for such purposes *to the extent that it is consistent with federal policy*. *See, e.g., Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980).[3] Where a state statute of limitations unreasonably inhibits the assertion of a federal claim or is otherwise inconsistent with important federal policies, this Court has not hesitated to reject its application to federal claims. *See, e.g., Burnett v. Grattan*, 468 U.S. 42 (1984) (rejecting application of six-month statute to claims under 42 U.S.C. § 1983).

Here, the application of the state statute to foreclose ISCA's federal claim simply because of delays resulting from the the City's own tardiness in resolving ISCA's request for administrative relief is clearly contrary to federal policy. Federal policy favors the avoidance of federal constitutional claims as

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[3] This analysis applies equally to federal claims brought in state courts as to such claims in federal court. *See, e.g., Mitchell v. Clark*, 110 U.S. 633 (1884); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958).

well as of needless litigation. These policies are obviously served by utilization of an administrative remedy that would, if successful, prevent the unlawful deprivation of property and thus obviate the need for constitutional litigation.

The New York court's ruling, by contrast, has precisely the opposite effect. It transforms an available administrative remedy into a trap by subjecting those who avail themselves of it to the risk that, if their request for administrative relief is delayed, their time for judicial assertion of their federal constitutional claims will have expired. Such a result is not only unfair, but it creates incentives for litigation that conflict with sound federal policy. Accordingly, the state statute may not be "borrowed" in these circumstances to foreclose the federal claim asserted. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (holding that application of one-year state statute of limitations to Title VII claims violated federal policy favoring administrative resolution of claims); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944) (state statute of limitations not applicable to bar claims where delay resulted from pending administrative proceeding).[4]

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[4] *Board of Regents v. Tomanio, supra*, relied upon by the court below and by the respondents, is clearly distinguishable. In that case, this Court held that where a plaintiff filed a state-law-based lawsuit challenging denial of a license, the New York courts need not toll the statute of limitations on a Section 1983 action seeking equivalent relief during the pendency of the state-law action. The basis of the Court's ruling was that it did not violate federal policy for New York to enforce a rule requiring the plaintiff to litigate state and federal claims simultaneously, thus denying the plaintiff two bites at the litigation apple. Here,

Third, even if a state statute of limitations is to be borrowed for application to ISCA's federal due process claim, federal law still controls the question of when that claim accrues. *See Rawlings v. Ray*, 312 U.S. 96 (1941). While a possibility of administrative relief was available to petitioner ISCA, the deprivation of its property without due process was not yet final, and its claim had not yet ripened. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).[5] Application of a purported "statute of limitations" to foreclose a federal claim before it has become ripe as a matter of federal law cannot constitute an adequate and independent ground for the state court's decision.

CONCLUSION

Respondents' attempts to avoid the constitutional issues presented by the New York court's decision are unavailing. As to five of the petitioners, it is clear that the lower court reached the constitutional ques-

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however, the effect of the state's application of its statute is *not* to spare the state the burden of litigating the same events twice in succession. Rather, it is to *require* the plaintiff to litigate prematurely, before the conclusion of an administrative proceeding that might spare *both* parties the burden of litigating. Clearly, forcing federal issues to litigation while an avenue for avoiding litigation altogether is available is contrary to federal policy, and it is in no way required by the reasoning of *Tomanio*.

[5] Contrary to respondent's contention (which is not supported by any citation of authority), the ripeness analysis of *Williamson County* has been applied not only to takings claims, but also to claims of procedural due process violations such as that advanced by ISCA. *See Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988), *cert. denied sub nom. Alter v. Schroeder*, 488 U.S. 891 (1988); *Herrington v. County of Sonoma*, 857 F.2d 567, 569, n.1 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

tion of the adequacy of a notice-by-request statute. Only as to one petitioner is there a suggestion of an adequate and independent state-law ground, and, as has been demonstrated, that ground cannot withstand analysis. Accordingly, for the foregoing reasons as well as those set forth in the petition for a writ of certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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February 1992